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# Maryland Reports.

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VOLUME LV.



175

17.

REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

Court of Appeals of Maryland.

J. SHAAFF STOCKETT,  
STATE REPORTER.

VOL. LV.

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## NAMES OF THE JUDGES, &c.

DURING THE PERIOD COMPRISED IN THIS VOLUME.

### THE COURT OF APPEALS.

- HON. JAMES LAWRENCE BARTOL, Chief Judge.
- HON. LEVIN THOMAS HANDY IRVING, Associate Judge.
- HON. JOHN MITCHELL ROBINSON, Associate Judge.
- HON. RICHARD GRASON, Associate Judge.
- HON. RICHARD HENRY ALVEY, Associate Judge.
- HON. OLIVER MILLER, Associate Judge.
- HON. RICHARD JOHNS BOWIE, Associate Judge.
- HON. GEORGE BRENT, Associate Judge.
- \*HON. JOHN RITCHIE, Associate Judge.
- †HON. DANIEL RANDALL MAGRUDER, Associate Judge.

### THE CIRCUIT COURTS.

FIRST JUDICIAL CIRCUIT.—*Worcester, Somerset, Dorchester and Wicomico* Counties.

- HON. LEVIN THOMAS HANDY IRVING, Chief Judge.
- HON. EPHRAIM K. WILSON, Associate Judge.
- HON. CHARLES F. GOLDSBOROUGH, Associate Judge.

SECOND JUDICIAL CIRCUIT.—*Caroline, Talbot, Queen Anne's, Kent and Cecil* Counties.

- HON. JOHN MITCHELL ROBINSON, Chief Judge.
- HON. JOSEPH A. WICKES, Associate Judge.
- HON. FREDERICK STUMP, Associate Judge.

THIRD JUDICIAL CIRCUIT.—*Baltimore and Harford* Counties.

- HON. RICHARD GRASON, Chief Judge.
- HON. GEORGE YELLOTT, Associate Judge.
- HON. JAMES D. WATTERS, Associate Judge.

FOURTH JUDICIAL CIRCUIT.—*Allegany, Garrett and Washington* Counties.

- HON. RICHARD HENRY ALVEY, Chief Judge.
- HON. GEORGE A. PEARRE, Associate Judge.
- HON. WILLIAM MOTTER, Associate Judge.

\* Appointed by the Governor on the 16th day of March, 1881, vice Hon. RICHARD JOHNS BOWIE, deceased; and elected on the 8th day of November following.

† Appointed by the Governor on the 10th day of February, 1881, vice Hon. GEORGE BRENT, deceased.



FIFTH JUDICIAL CIRCUIT.—*Carroll, Howard and Anne Arundel Counties.*

HON. OLIVER MILLER, Chief Judge.

HON. EDWARD HAMMOND, Associate Judge.

HON. WILLIAM N. HAYDEN, Associate Judge.

SIXTH JUDICIAL CIRCUIT.—*Montgomery and Frederick Counties.*

HON. RICHARD JOHNS BOWIE, Chief Judge.

\*HON. JOHN RITCHIE, Chief Judge.

HON. JOHN A. LYNCH, Associate Judge.

HON. W. VEIRS BOVIC, Associate Judge.

SEVENTH JUDICIAL CIRCUIT.—*Prince George's, Charles, Calvert and St. Mary's Counties.*

HON. GEORGE BRENT, Chief Judge.

HON. ROBERT FORD, Associate Judge.

†HON. DANIEL R. MAGRUDER, Associate Judge.

‡HON. RICHARD B. B. CHEW, Associate Judge.

EIGHTH JUDICIAL CIRCUIT.—*Baltimore City.*

## THE SUPREME BENCH OF BALTIMORE CITY.

HON. GEORGE WILLIAM BROWN, Chief Judge.

HON. GEORGE W. DOBBIN, Associate Judge.

HON. HENRY F. GAREY, Associate Judge.

HON. CAMPBELL W. PINKNEY, Associate Judge.

HON. ROBERT GILMOR, Associate Judge.

The Judges of the Supreme Bench were assigned to the following Courts under an order which took effect on the second Monday of January, 1880:

SUPERIOR COURT.—HON. ROBERT GILMOR with HON. HENRY F. GAREY, to assist.

COURT OF COMMON PLEAS.—HON. GEORGE WILLIAM BROWN with HON. CAMPBELL W. PINKNEY, to assist.

CITY COURT.—HON. HENRY F. GAREY, with HON. GEORGE W. DOBBIN, to assist.

CIRCUIT COURT.—HON. GEORGE W. DOBBIN, with HON. ROBERT GILMOR, to assist.

CRIMINAL COURT.—HON. CAMPBELL W. PINKNEY, with HON. GEORGE WILLIAM BROWN, to assist.

## ATTORNEY GENERAL.

CHARLES J. M. GWINN, Esq.

## CLERK.

SPENCER C. JONES, Esq.

\* Appointed by the Governor, on the 16th day of March, 1881, *vice* Hon. RICHARD JOHNS BOWIE, deceased.

† Appointed Chief Judge by the Governor, on the 10th day of February, 1881, *vice* Hon. GEORGE BRENT, deceased.

‡ Appointed by the Governor, on the 10th day of February, 1881, *vice* Hon. DANIEL R. MAGRUDER, resigned, and advanced to the Chief Judgeship.

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## CASES

DECIDED DURING THE PERIOD COMPRISED IN THIS VOLUME, AND  
DESIGNATED BY THE COURT "NOT TO BE REPORTED."

CRONHART, CHARLES *vs.* THE PRESIDENT AND DIRECTORS OF THE  
GERMAN FIRE INSURANCE COMPANY OF BALTIMORE, *et al.*  
*Proceeding to have set aside a Mortgage upon the alleged ground,*  
*that it was executed for the purpose of Defrauding the complainant,*  
*a holder of Notes issued by a Building Association under a First*  
*Mortgage to it, and which Mortgage was released without being fully*  
*paid, so far as his claim was concerned. Bill dismissed for want of*  
*proof, that the appellees took the Second Mortgage Fraudulently, or*  
*with Notice of Outstanding Equities of the complainant against*  
*the mortgaged property. No. 54, October Term, 1880. Recorded*  
*in Liber, S. C. J., No. 1, folio 195, of "Opinions Unreported."*

ECKHART, JOHN *vs.* JOHN T. DIVEN, JOHN T. MAY, *et al.* *Appeal*  
*from an order dissolving an Injunction issued on a bill alleging that*  
*the defendants had obtained Judgments in attachment suits against*  
*the complainant, before a Justice of the Peace, and had executions*  
*issued thereon, without the attachments being levied in the com-*  
*plainant's hands, and without his being summoned to answer the*  
*attachments. On answers and testimony, showing that the attachments*  
*had been levied and the complainant summoned, the injunction was*  
*dissolved. It was held that, if there were Irregularities in the*  
*Attachment proceedings, the complainant should have availed him-*  
*self of them by Appeal from the Judgments to the Circuit Court for*  
*the County. No. 8, October Term, 1880. Recorded in Liber*  
*S. C. J., No. 1, folio 197, of "Opinions Unreported."*

GEISS, JOHN T. *vs.* MATHIAS VOGLER AND CATHARINE, HIS WIFE.  
*Action for Damages for Obstructing an Alley, claimed to be appur-*  
*tenant to the plaintiff's premises, and for Acts committed by the*  
*defendants after the plaintiff had acquired title. Questions of*  
*fact and evidence. (See the case of Vogler vs. Geiss, 51 Md., 507.)*

No. 14, October Term, 1880. Recorded in Liber S. C. J., No. 1, folio 191, of "Opinions Unreported."

GORDON, FOR HIMSELF AND AS TRUSTEE, JOSIAH H. *vs.* HENRY J. MCNAMEE. *Appeal from an order ratifying an Auditor's account in Insolvency. Questions as to Claims and Equities of the Trustee, and the Distribution of Moneys collected by him.* (See the case of *Gordon, Trustee, et al. vs. Matthews, et al.*, 30 Md., 235, and *McNamee vs. Gordon, Trustee*, 42 Md., XI.) No. 75, October Term, 1880. Recorded in Liber S. C. J., No. 1, folio 184, of "Opinions Unreported."

JAMES, FRANK *vs.* HENRY DARLING. *Action for Assault and Battery and False Imprisonment. Judgment by Default against Defendant, who appeared at the Inquisition, and after testimony taken, the Jury under an Instruction granted at the instance of Defendant, rendered a Verdict for Plaintiff for One Cent Damages and costs, the Plaintiff having Failed to Prove his case at the Inquisition.* No. 107, October Term, 1880. Recorded in Liber S. C. J., No. 1, folio 194, of "Opinions Unreported."

JARRETT, WILLIAM B. *vs.* GEORGE MARR & CO. *Action by George Marr & Co., composed of George Marr and Thomas R. Atkinson, on a promissory note made by Jarrett, a member of a former firm of the same style, composed of Jarrett and the above, which old firm was dissolved on the 1st June, 1875, (as testified by Atkinson) on which day the note was made by Jarrett, "payable to George Marr," four months after date. It was endorsed by Marr, who died after the institution of this suit. Defendant testified, that he continued a member of the firm until the 1st Nov., 1875. Questions of fact as to whether the note was given in Settlement of Partnership Accounts, or as an Accommodation to Marr. The Defendant's prayers (rejected by the Court below:)—1. That if the jury found that the firm of George Marr & Co. became the owner of the note sued on, while the defendant, Jarrett, was a member of that firm, and that after the defendant ceased to be a member of that firm, the firm of George Marr & Co., plaintiffs in this case, obtained the note by its remaining in the possession of George Marr or Thomas R. Atkinson, without any actual transfer of it from the old firm of*

*George Marr & Co. to the new one, then the verdict should be for the Defendant. 2. and, That if the jury found that the note sued on was the property of the firm of George Marr & Co. at the time the defendant, Jarrett, ceased to be a member thereof, then they should find for the Defendant, unless they further found that the defendant, Jarrett, assented to the transfer of the note to the new firm of George Marr & Co., plaintiffs in this case—were held to be good; and the judgment below was reversed, and a new trial awarded. No. 2, October Term, 1880. Recorded in Liber S. C. J., No. 1, folio 182, of "Opinions Unreported."*

CORRIGENDA.

On page 65, in the fourth line from the bottom, insert "if" between "that" and "it."

On page 90, in the fourteenth line from the bottom, for "not" (the last word in the line) read "now."

On page 361, in the eighth line from the top, after the word "indictment," there should be a comma instead of a semicolon.

On page 363, in the fourteenth line from the bottom, strike out the comma after the word "Webster."

On page 518, in the first line of the *syllabus*, for "Mortgagor" read "Mortgages."

On page 571, in the fourth line from the top, for "57" read "56."



# MARYLAND REPORTS.

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OCTOBER TERM, A. D., 1880.

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JOHANN F. M. LOEBER and JOHANNA HERRING *vs.*  
JOHN ECKES.

*When a Sale of Mortgaged premises will be set aside on account of Inadequacy of Price and Injurious Representations by the Mortgagee.*

Where it appeared from the testimony taken under exceptions to the ratification of an attorney's sale of mortgaged property under a power contained in the mortgage, that the property, which sold for \$4550, was worth largely over \$6000, and that at least one *bona fide* bidder, willing, able and anxious to buy, and who would have bid a much larger sum than that at which the property sold, was kept away from the sale by the direct agency of the mortgagee's president, and in consequence of representations and an agreement which he made, but which he afterwards failed to carry out, it was  
**HELD:**

That the sale should be vacated and a new one made.

APPEAL from the Circuit Court for Baltimore County, in Equity.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., MILLER, ALVEY and ROBINSON, J.

*Lewis Hochheimer*, for the appellants.



---

Loeber and Herring *vs.* Eckes.

---

*R. R. Boarman*, for the appellee.

MILLER, J., delivered the opinion of the Court.

This is a case of exceptions to a sale under a power contained in a mortgage. The mortgage was executed by the appellee to the Permanent Land Company of the City of Baltimore, to secure the sum of \$3000. The property mortgaged was twenty acres of land in Baltimore County, on the Trappe Road, about three miles from the city limits, and the improvements consisted mainly of a tavern and out-buildings. The amount due on the mortgage was the principal and a small arrear of interest. The sale was made by the attorney named in the mortgage, at the court-house door in Towsontown. It appears to have been duly advertised in a county newspaper, and it does not appear that any other notice of the sale was given. The property was sold to the appellants for \$4550, and exceptions to its ratification were filed by the mortgagor. These exceptions were sustained, the sale set aside, and from the order vacating the sale the purchasers have appealed.

The exceptions mainly relied on, and the only ones we shall notice, are inadequacy of price, that bidders were kept away by the mortgagee's agent for the purpose of preventing a fair sale, whereby the property sold for one-half its value, and that the sale was injured by fraudulent means adopted by the mortgagee and its agents, other than the attorney who made the sale.

It is well settled that mere inadequacy of price by itself is not sufficient to set aside a sale made by a trustee under a decree in equity, unless it be so gross and inordinate as to indicate want of reasonable judgment and discretion, or misconduct or fraud, in the trustee, or some mistake or unfairness for which the purchaser is responsible. This is the doctrine of all the Maryland authorities, but at the same time they all declare that where it appears there is

any other just cause to doubt the propriety of the sale, it is a consideration very proper to be viewed in connection with it, that the sale has been made at a reduced price. That was the doctrine announced in *Glenn vs. Clapp*, 11 G. & J., 9; and in *Johnson vs. Dorsey*, 7 Gill, 294, the leading case on this subject, the Court say: "It is certainly true that inadequacy of price is to be regarded as a strong auxiliary argument in combination with circumstances calculated to cast doubt or suspicion upon the correctness of the sale." Here the sale was not under a regular decree in equity, but under a power in a mortgage, and was made at the instance and for the benefit of the mortgagee. In such a case what has been thus said in these decisions is peculiarly applicable, and we are clearly of opinion that if it appears there has been anything like fraud or unfairness on the part of the mortgagee or his agents in reference to the sale and calculated to affect it injuriously, that fact, in connection with great inadequacy of price, is good ground for setting it aside.

Now it is shown in this case by a great preponderance of proof that the property was worth largely over \$6000. Witnesses living in the immediate neighborhood testify that the land was worth \$300 per acre without the improvements. One witness says that two years ago he offered the appellee \$6000 for the property, and communicated the fact that he had made this offer, to Friedenwald, *the president of the mortgage company*, and that he will give that price for it now if he can get it. Another states that in June, 1878, he offered \$450 per acre, and was then ready to pay the appellee that price for it, and that it is worth as much as that at the present time. Mrs. Haschert who at the time of the sale and for some years before had rented the tavern or hotel and about eight acres of the land at the yearly rent of \$360, payable quarterly, says she offered the appellee \$3500 *for the part she occupied*, and told Friedenwald before the sale she would give that for

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it. This sum was quite sufficient to pay off the mortgage debt in full and would have left the residue of the land for the mortgagor. But what is more important, it is proved that after the advertisement and before the sale, Friedenwald, the president of the mortgagee, went out to the tavern and told Mrs. Haschert that if any one came to inquire about the property, she must give it a bad name, say it was sickly there, and that it was no business place; that a few days before the sale he asked her if she wanted the place, and she said if it was sold she would like to have it; he then asked her if she wanted the whole or only a part, and she said she wanted the part she occupied with the buildings on it, and he replied it made no difference, that he would buy it all and then let her have the part she wanted; that he then asked her how much she would give for that part, and she replied \$3500, the same she had offered Eckes for it; that he then told her she *must not go to the sale*, that he would buy it, that he had the property in his hands and could get it cheaper than she could, that she must hush up and not tell anybody, but must give him something for buying, and she agreed to give him \$50; that in consequence of this agreement and what he told her, she *did not go* to the sale; that if this arrangement had not been made *she would have gone* and bid at least as high as \$6000 for the property, and that she will now give that much for it, and has the money to pay for it; that she told him at the time the place was worth \$7000, and that Wenig had offered Eckes \$6000 for it, which sum he would not take. Friedenwald went to the sale and bid but only to the extent of \$4500 and did not buy. It thus appears that at least one *bona fide* bidder, willing, able and anxious to buy, and who would have bid a much larger sum than that at which the property sold, was *kept away* from the sale by the *direct agency of the mortgagee's president*, and in consequence of representations and an agreement which he made, but which he afterwards failed to carry out.

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In view of these facts we have no hesitation in affirming the order which vacates the sale and directs a new one to be made.

*Order affirmed, and  
cause remanded.*

(Decided 9th December, 1880.)

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THOMAS SMITH vs. NICHOLAS THOMPSON.

*Trespass on a Burial Lot—Punitive Damages.*

An action of trespass *quare clausum fregit* can be maintained for breaking and entering a burial lot; the trespass complained of being the digging a grave in the lot and burying therein the corpse of a child without the consent of the plaintiff, who had acquired the privilege and right to make interments in the lot to the exclusion of others, so long as the ground belonging to a society of which the plaintiff was a member, (in which ground was the lot purchased by the plaintiff,) remained a cemetery; and which right or privilege had not been forfeited or lost at the time the action was brought, though the plaintiff had withdrawn from the society, which was subsequently incorporated by the Act of 1867, ch. 343.

There being evidence before the jury from which they could find that the defendant was actuated by malice in committing the trespass, the plaintiff was entitled to punitive damages.

APPEAL from the Circuit Court for Frederick County.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., BOWIE, MILLER, ALVEY, and IRVING, J.

*Edward Y. Goldsborough* and *Charles W. Ross*, for the appellant.

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*William Ritchie and John Ritchie, for the appellee.*

MILLER, J., delivered the opinion of the Court.

This is an action of trespass *quare clausum fregit* brought by the appellee against the appellant for breaking and entering the plaintiff's burial lot, No. 19, in "The Laboring Sons' Cemetery." The trespass complained of is, that the defendant in June, 1879, dug a grave in this lot and buried therein the corpse of a child, without the plaintiff's permission or consent. The facts to be first stated are substantially as follows:

In 1839 an unincorporated voluntary association of colored men was formed under the name of "The Beneficial Society of Laboring Sons of Frederick." In 1851 or 1852, this society purchased a lot of ground in Frederick City from Ezra Houck. In the latter year, about *one-fourth* of this ground was, by order of the society, laid off into sixty burial lots, of twelve by sixteen feet each, and each of these lots was marked and indicated by four corner posts of white marble, with the respective numbers marked on the stones, which are still there and plainly visible. To each full member who had, at that date, paid up all his dues and fees, one of these burial lots was assigned. A plat was also made of the whole, on which was indicated the individual owner of each lot, according to the allotment and division then made, and lot No. 19 was thus assigned to the plaintiff, who had become a member of the society in 1846 or 1847, and had then paid up his dues in full. In August, 1854, a deed was executed by Houck, in lieu of one which had been previously executed, but which had been mislaid and lost before it was recorded, conveying the whole lot of ground to seven named parties, of whom the plaintiff was one, "and their heirs and assigns forever, *in trust*, that they, the survivors or survivor of them, and the heirs of such survivors or survivor, shall hold said property upon the *trusts* indicated and mentioned in the

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recital of this indenture." In the reciting part of the deed, after stating that the purchase money of \$265 had been paid in full, and that the parties of the second part "now constitute the trustees of said Laboring Sons' Society," it is recited that "*said society has laid off a portion of said ground as a burial ground*, and have desired and directed said trustees to *sell the residue* to the best advantage for the use of said society." All the trustees named as grantees in this deed are now dead except three, Bowen, Probee and the plaintiff. After this allotment and division the plaintiff took such possession of his lot as the purpose to which it was devoted admitted of. In 1858 he buried his aunt there, in 1862 a relative of his wife, in the spring of 1864 his mother, and put up a tombstone for her and had the lot sodded, and in 1878 had this tombstone righted and repaired. It also appears that in 1861 a certificate was issued by order of the society to each of the parties to whom these lots had been so assigned, and the plaintiff received his, which is as follows:

"LABORING SONS' CEMETERY."

This is to certify, that Nicholas Thompson is *the owner* of lot No. 19 in Laboring Sons' Cemetery for which 10 dollars have been paid in full for said lot. In testimony whereof, the president of the trustees has hereunto affixed his hand and seal this 2d day of November in the year 1861.

"Robert E. Probee. [Seal.]"

"Test: Cyrus Bowen."

About these facts there is no dispute, and if there was nothing else in the case, there can, we think, be little doubt as to the plaintiff's right to maintain this action. The facts thus stated make a case where the trustees who held the legal title and were themselves members of the society, the *cestui que trust*, unite with all the other members, who were fully competent to act, each for himself in



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the premises, in setting apart a portion of this ground for burial purposes, and in a voluntary parol partition of that part into separate lots clearly defined and bounded, and in the assignment of these lots severally to individual members, as their respective separate burial places, and this is followed by the separate possession of the individual owners, and the grant of a certificate by the order of the society itself, stating that each member is the owner of the separate place so assigned to him, and for which he had paid the price agreed upon in full. By virtue of these acts and proceedings we think it clear the plaintiff acquired the privilege and right to make interments in this lot, to the exclusion of others, so long as the ground remained a burying ground or cemetery, and that for an invasion or disturbance of this right either by a member of the society or any one else he can maintain an action of trespass *quare clausum*. Looking to the peculiar nature of this privilege and knowing how highly it is esteemed, and how sacred it is held by mankind in all civilized communities, we should so decide were the question a new one; but we think the right to maintain the action under such circumstances is sustained by the decision of this Court in *Partridge's Case*, 39 Md., 631, and by the decisions in *Kincaid's Appeal*, 66 Penn. State Rep., 411, and *Meagher vs. Driscoll*, 99 Mass., 281.

The next question is, had the right or privilege thus secured to the plaintiff been forfeited or lost at the time this action was brought? It seems that in consequence of some disagreement among the members, the plaintiff and twenty others, (the whole number of members being forty) in 1862 withdrew and formed another society called "The Workingmen's Society," and thereafter ceased to be members of the old society. The other nineteen members remained in and were subsequently incorporated by the Act of 1867, ch. 343, under the corporate name of "The Beneficial Society of the Laboring Sons of Frederick City." In October, 1863, after some dispute, an equal *pro rata* division

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of the money (\$655) then in the treasury of the old society was made among all the forty members, and the amount coming to the withdrawing members was paid to them or into the treasury of "The Workingmen's Society," and a receipt given therefor. It is argued that by this withdrawing and ceasing longer to be members of the society, the withdrawing members forfeited and lost all their interest and rights in these lots. But in our opinion such was not the necessary consequence of the *mere* act of withdrawing. It is true, it might have such effect if the parties intended it should, but it was clearly competent for them to withdraw and cease to have any interest in the future income and benefits of the society, and still retain their rights in the lots which they had secured and paid for at the time of the division and allotment in 1852. It was the purpose of the society, as stated in the deed from Houck, to sell the *residue* of the ground, that is, all save the portion laid off and allotted to the members in 1852, to the best advantage for the use of the society, and they proceeded to sell burial lots in this residue to other parties. Of course, by withdrawing, these parties would cease to have any interest in the proceeds of these sales made after their withdrawal, and all other benefits pertaining to continuing membership, but it was quite consistent with this, and so far as we can see, perfectly lawful for them, if such was their intention, to retain their previously acquired, perfected and vested interests and privileges in these particular lots. A paper, dated the 6th of October, 1863, was offered in evidence by the defendant, purporting to be signed by all the withdrawing members, including the plaintiff, in which they certify that "they have no more right or title, or interest in the aforesaid society, or interest in the benefit arising from the graveyard of the said society." Even if this language could be construed as manifesting a purpose on the part of the alleged signers to relinquish or abandon their rights in these lots, the

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Court was perfectly right in rejecting the paper, because it was not only never signed by the plaintiff, but his name and the names of all the others, except Probee, were put to it by another party without any authority to do so. The plaintiff testifies not only that he never signed this paper and never authorized any one to sign it for him, but that when the settlement in October, 1863, was made, he never heard it contended that the withdrawing members gave up their lots. He continued afterwards and ever since to assert an exclusive right to this lot. He buried his mother there in 1864, in the same year put up a tombstone, later on had the lot freshly sodded, as late as 1878 had the tombstone repaired, and when his right was invaded for the first time by the defendant, he promptly brought this action. Indeed, it is highly improbable these parties intended, by withdrawing, to revest their exclusive privileges in these lots in the society, and thus give the society the power to *remove the bodies* they had already buried in their lots. But however this may be, no question as to purpose or intent is before us nor was any such question left to the jury. The plaintiff offered no prayer on the question of right or title, and the defendant's prayers rest the defence solely on the *bare facts* of withdrawal, non-membership at the time of the trespass, and the subsequent incorporation of the society by the Act of 1867, ch. 343. In our opinion, neither of these facts of itself or in combination with the others constitutes a bar to this action.

The only prayer of the plaintiff that was granted relates to the question of damages and we find no error in it. It tells the jury they may consider the motive and manner with which the trespass complained of was done by the defendant, and though they may find he was instructed by the society, as their sexton, to bury on the lots of which the plaintiff's was one, they may nevertheless award punitive damages if they find he was not acting in good faith under such instruction, and from an honest belief in the

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right and authority of the society so to instruct him, but was in reality actuated by malice or ill-will towards the plaintiff or a wanton disregard or indifference to his rights. There was evidence from which the jury could have found the defendant was actuated by malice in committing this trespass, and it follows the Court was right in rejecting the defendant's fourth prayer, which asserts that the verdict must be for nominal damages only.

What we have thus said disposes of all the rulings in the several exceptions. We find no error in any of them, and the judgment must be affirmed.

*Judgment affirmed.*

(Decided 9th December, 1880.)

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FELIX MUNSHOWER vs. THE STATE OF MARYLAND.

*Evidence in a Trial for Murder—Gruber's Almanac.*

The State, in a trial of M. for murder, proved by K., that W., the alleged deceased, left K's house where W. was making his home, on Tuesday morning, August 5th, 1879, and proceeded up the public road towards Emmittsburg; that on the Sunday following W. not having made his appearance, K. went to the house of R., where M. was then staying, and inquired of M. whether he had seen anything of W.; that M. said he saw him on Tuesday, talked with him on the hill, when he left, saying he was going to Tom Shorb's and from there to town, and that he, M., then went to Motter's Station; that on Tuesday, the 12th, W's body was found buried in Myers' woods, with a wound in the back of the neck, two holes close together, as though both barrels of a gun had been fired at once into the neck, and the face was torn away; that about sixteen feet from the grave was a small ravine, which presented marks and the appearance of having been first used for the burial of the body; that there were leaves in it, and leaves had been raked out. The State then proved by S. that on the afternoon of

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August 4th, he saw M. in Knode's woods sitting near the road; that he went to him and talked with him, and he asked S. if S. had seen anything of W. S. replied no, and said, why don't you go to the house; to which M. replied, I am not going there, Sarah, (meaning K's wife, and W's sister,) makes such a fuss; she knows my business better than I do; that a short time afterwards M. met S. near the barn on Kane's place, and asked S. if he was going to Zacharia's, and they then went together as far as Tom's creek; on the way they had some talk about the gun M. was carrying; M. shot a squirrel with the left hand barrel of the gun, reloaded it and remarked, that he kept the right hand barrel for long range, it shot better. Upon cross-examination, S. was asked whether on Monday, the 11th, before W's body was found, he had in a conversation with one G., in the public road, near the house of J. McC., told G. that W. had been murdered and buried under leaves in Myers' woods, and that his head had been mashed in. The State objected and the Court below refused to allow the question to be answered. On exceptions by M., it was HELD:

That the objection was properly sustained.

The State offered in evidence "Gruber's Almanac for 1879," for the purpose of proving at what hour the moon rose on the night of Saturday, August 9th, 1879, but M. objected to the admissibility of the almanac for said purpose. The Court below overruled the objection, and allowed the almanac to be offered in evidence. On exceptions by M., it was HELD:

That the evidence was admissible.

The State proved by F. that he was a witness at the coroner's inquest on August 13th, 1879; that, after all the witnesses had testified, M. was brought in and was told that if he desired it he could have the witnesses re-called; that the testimony of those who had been sworn was read over to M., and that, when that of F. was read over, to the effect that he had seen M. at Motter's Station on August 5th, between 10.30 and 11 A. M., M. turned to F. and said, I think you are mistaken about that, I was at the station about 9 o'clock that morning, and if you consult Mr. N., you will find that I am right, and I can prove that by H. R. and S. D. The State also proved by other witnesses, declarations of M. that he had arrived at Motter's Station at 9 A. M., on August 5th. M. then called H. R., and asked him whether he had been a witness on the inquest, to which he replied yes, and then further asked him whether he had not testified, on that occasion, that he saw M. at Motter's

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Station on the morning of August 5th, about 9 o'clock, offering to show that H. R. had, previously to the statements and declarations by M., told a brother-in-law of M. that he had seen M. at said station at that hour, which was mentioned to M. by the brother-in-law; that this offer was made to show that the statement made by M. to F. was based upon the statement of H. R., and that H. R. was, in point of fact, mistaken about the time; the object being to rebut the charge that M. had attempted to set up an *alibi*, and to show that his mistake was the result of the error of H. R. The State objected, and the Court below refused to allow the question to be asked and answered, and the evidence to be offered. On exceptions by M., it was HELD:

That the objection was properly sustained.

APPEAL from the Circuit Court for Frederick County.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., MILLER, ALVEY, ROBINSON and IRVING, J.

*James McSherry* for the appellant.

The question excluded by the ruling of the Court below, as stated in the *first exception*, was admissible to discredit the witness. It is held that upon an indictment for murder, the admissions of other persons that they killed the deceased, are not evidence. But where the party making the admissions is produced as a witness against the accused, the witness' declarations that he is guilty of the offence, are admissible to discredit the witness. *Smith vs. State*, 9 Alabama, 990; *State vs. Duncan*, 6 Iredell, 326. See also 1 *Wharton's Crim. Law*, sec. 662.

As to the *second exception*, the best evidence of which the case in its nature is susceptible, is always required. The almanac in question was certainly not the best evidence, nor indeed any evidence of when the moon rose on that night. 1 *Starkie's Ev.*, sec. LXXV.

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It is said in 1 *Chitty's Pleading*, 218: "The Courts take notice of the days of the week, &c., on which particular days fall, and the almanac is part of the law of the land, having been established by different statutes."

But the almanac referred to by Chitty is that annexed to the Common Prayer Book. HOLT, C. J., in *Brough vs. Perkins*, 6 Mod., 80.

By 24 *George 2*, ch. 23, the calendar annexed to the Common Prayer Book was declared erroneous, and a new calendar, tables and rules were substituted therefor.

It is of these matters that the Court takes judicial notice, and the calendar, tables and rules mentioned by this Act of Parliament are evidence; but the question involved in the exception under consideration is quite a different one. No such calendar or almanac was offered by the State, but one published without any sanction, and depending for its accuracy entirely upon the capacity of the individual who prepared the calculations. Besides, if the author of the work is living and accessible, he himself should have been produced, so that his means of knowledge might have been ascertained. *Morris & Gwynne, vs. Harmer's Heirs*, 7 Peters, 554.

The object of the evidence of Fisher, as stated in the *third exception*, was to show that the prisoner had attempted to set up an *alibi*, which was in point of fact false; and that, therefore, failing in his *alibi*, he was the guilty party. *Wills' Circumstantial Ev.*, side page 83.

Having adduced this inculpatory evidence against the appellant, it was clearly competent for him to show that the mistake was not his, but another's; that when he asserted that he was at Motter's Station, about nine o'clock, A. M., he was acting in good faith, because acting on information which had been imparted to him from a source that he had a right to credit. The sincerity of his statement was what was material. Though false in fact, if made *bona fide*, it was no evidence of guilt. 1 *Wharton's*

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*Crim. Law*, sec. 663; 1 *Greenl. Ev.*, sec. 101; *Friend, et al. vs. Hammill*, 34 *Md.*, 308.

*Charles J. M. Gwinn*, Attorney-General, for the appellee.

Upon the *first exception*: the rules of evidence are the same in civil and criminal cases. 1 *Bishop on Crim. Prac.*, 3rd *Ed.*, 1880, sec. 1046.

The question at issue was whether the appellant was guilty of the murder whereof he stood charged. It neither tended to prove the guilt, or innocence of the accused, to show that a person, produced as a witness in the case, had stated in conversation with a stranger, before the body of Wetsell had been found, that Wetsell had been murdered and buried under leaves in Myers' woods; and that his head had been "mashed in." If the witness ever made such a remark, it might have tended to show that some facts, or circumstances, had been brought to his knowledge which induced him to form that opinion before the body was found. But it was not admissible to ask him whether he had expressed such an opinion; for to do this was to permit the witness to give utterance to an opinion without disclosing the grounds upon which that opinion was formed.

The question was not admissible for the purpose of impeaching the credit of the witness, by contradicting him, because the question was irrelevant to the issue. 2 *Taylor on Evidence*, 6th *Ed.*, sec. 1292; and because the witness, in his examination in chief, had made no statement inconsistent with the opinion which the question implied that he had expressed as to the manner of Wetsell's death, and the place where his body was concealed.

The question was not admissible, upon cross-examination, because the witness upon his examination in chief had not made any statement as to his belief or opinion as to the manner of Wetsell's death, or the place, or mode, of his interment. *Phila. and Trenton R. R. Co. vs. Stimpson*, 14 *Peters*, 461.



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Upon the *second exception*: the Act of 24 George 2, ch. 23, regulating the commencement of the year, and for correcting the calendar then in use, is in force in this State. *Killy's Report on Stats.*, 252; *Alexander's Brit. Stat.*, 767.

Under that statute the period primarily determined is the day on which the new year shall commence. 24 George 2, chap. 23, section 1. The statute does not say on what day each succeeding day of the new year shall fall. That is left to be computed from the fixed date supplied by the statute.

Now it must be conceded that a Court may inform itself of the day of the week on which a particular day of the month will fall, though that be matter of calculation, from the data furnished by the statutory beginning of the year, and may permit the jury, under its observation, to derive evidence of such fact, from a computation of such succession of days found in an almanac. *Page vs. Fawcett*, 1 Cro. Eliz., 227; 1 Stark. on Ev., 3rd Eng. Ed., 509; 2 Saund. Pl. & Ev., 722; *Kilgour vs. Miles and Goldsmith*, 6 H. & J., 274; *Sasscer vs. Farmers' Bank*, 4 Md., 420.

The designation of days in the computation of time, made in an almanac, necessarily involves the computation of the times marked by the natural divisions of each day—that is to say, among others, the periods of the rising and setting of the sun. The designations of the time of the full moon in each lunar month necessarily involves the computation of the times of the rising and setting of the moon in each day of each lunar month. These are not contingencies, which may, or may not happen, and the proof of the occurrence of which depends upon evidence. The precise periods at which the sun, or the moon, will rise or set, during any particular period of twenty-four hours of the future, is as absolutely certain as the occurrence of the day in which such rising, or setting will take place. If the computation of each day in its season, made in an

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almanac, is evidence that such day will recur in such season, is not the equally certain computation of the rising and setting of the sun or moon, on such day, made in an almanac, equal evidence of the times when such events will occur? These events are all equally matters of computation from data, which the statute provides in its designation of periods in the statutory year.

Weather reports, kept at an asylum, *De Armand vs. Neasmith*, 32 Mich., 231; reports of the state of the markets, *Sisson vs. R. R. Co.*, 14 Mich., 497; *Lush vs. Druse*, 4 Wend., 317, and price currents, have been held to be admissible in evidence, *Cliquot's Champagne*, 3 Wall., 140, though these are records which are not capable of mathematical demonstration, which cannot be tested by any certain law, and which may or may not, omit the record of changes which have actually taken place. But an almanac forecasts with exact certainty planetary movements. We govern our daily life by reference to their computations. No oral evidence, or proof, which we could gather as to the hours of the rising, or setting, of the sun or moon, could be as certain, or accurate, as that which we may obtain from such source. Why should not these computations, which are, after all, but parts of the ordinary computations of the calendar, be admitted as evidence?

Upon the *third exception*: the question and proposed offer were not admissible, because the failure of an accused person to maintain a particular defence, upon which he relied when he was first suspected, or arrested, or on his trial, is not a circumstance which creates any legal presumption against him; and both question and answer were, therefore, immaterial. No evidence is admissible in a criminal trial, which does not tend to prove a fact,—or to rebut proof offered as to a particular fact,—or to rebut some presumption of law.

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MILLER, J., delivered the opinion of the Court.

The appellant was indicted and tried for the murder of James L. Wetsell, and the jury, by their verdict, found him guilty of murder in the first degree. At the trial, his counsel took three exceptions to the rulings of the Court upon questions of evidence, which this appeal brings up for review, and we shall dispose of them in their order.

*First Exception.* The State proved that early on Tuesday morning, the 5th of August, 1879, Wetsell left the house of Knode, where he was making his home, and proceeded up the public road towards Emmittsburg. On the Sunday following, Wetsell not having made his appearance, Knode went to the house of one Rentzell, where the prisoner was staying, and inquired of him whether he had seen anything of Wetsell, and the prisoner said he saw him on Tuesday, talked with him on the hill, when he left, saying he was going to Tom Shorb's, and from there to town, and that he, the prisoner, then went to Motter's Station. On Tuesday, the 12th of August, Wetzell's body was found buried in Myers' woods, with a wound in the back of the neck—two holes close together as though both barrels of a gun had been fired at once into the neck—and the face was torn away. About sixteen feet from the grave there was a small ravine which presented marks and the appearance of having been first used for the burial of the body; there were leaves in the place, and some leaves had been raked out. The State then proved by Thomas Shorb, that on the afternoon of the 4th of August, he saw the prisoner in Knode's woods sitting near the road, and he went to him and talked with him; he asked witness if he had seen anything of Wetsell, and witness answered no, and said, why don't you go to the house? to which the prisoner replied, I am not going there, Sarah (meaning Knode's wife and Wetsell's sister) makes such a fuss, she knows my business better than I do; that a short time afterwards prisoner met witness near the barn

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on Kane's place and asked him if he was going to Zacharia's, and they went together as far as Tom's Creek; on the way they had some talk about the gun the prisoner was carrying; he shot a squirrel with the left hand barrel, reloaded it, and remarked that he kept the right hand barrel for long range, it shot better. Upon cross-examination this witness was asked whether on Monday the eleventh, before the body of Wetsell was found, he had, in a conversation with Otho Grimes, in the public road, near the house of John McCarthy, told Grimes that James Wetsell had been murdered and buried under leaves in Myers' woods, and that his head had been mashed in? The Court, upon objection made by the State, refused to allow the question to be answered, and to this ruling the prisoner excepted.

Counsel for the appellant contend that an answer to this question was admissible for the purpose of discrediting the witness; that if he had answered the question in the negative he would have been contradicted and discredited by the impeaching witness, and if he had answered in the affirmative it would have evidenced the possession of knowledge that the guilty party alone would be likely to have, and this would have discredited him. They admit that on a trial for murder the admissions or declarations of third persons that they killed the deceased are not evidence, but they insist that if such third persons, on being examined as witnesses, *implicate the prisoner by their testimony*, evidence of their declarations that they were guilty of the offence is admissible to discredit the witnesses. This proposition is broadly stated in 1 *Whart. Cr. Law*, sec. 662, and runs through all the editions of that valuable book. The only authority, however, cited in its support is the case of *Smith vs. The State*, 9 *Ala.*, 990. An examination of that case has convinced us that the learned author has fallen into error in stating the proposition thus broadly, or has misapprehended the deci-

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sion actually made by the Court. In that case, Smith, a slave, was on trial for the murder of Edmund, another slave, and the witness, Sam, had been tried and acquitted the day before of the same murder. On the trial of Smith, Sam was examined as a witness by the State and denied any knowledge of the murder of Edmund, or of the participation of Smith in it, but stated some circumstances tending to implicate Smith. The prisoner's counsel then offered to prove, that while the trial of Sam was in progress, he, being at the time in jail, became alarmed and desired Neal, a white man then present, to request the jailor to send for his master, and then stated in Neal's presence that he, Sam, had wrongfully accused the boy Smith of the murder of Edmund, and he wished so to tell his master, that he did not wish to die with a lie in his mouth, and cause the innocent to suffer, and the question was, whether this was admissible in evidence on the trial of Smith *for any purpose*. The opinion of the Court was delivered by ORMOND, J., and he says—"In my opinion it was mere hearsay. It appears that Sam had previously stated, that Smith, a few days after the death of Edmund, had told him that he killed Edmund with a gun-barrel, and it appears to me very clear that the only rational meaning that can be put upon the declarations of Sam, in jail, is, that he had accused Smith falsely to his master. His own trial was then in progress, he apprehended it would terminate fatally, and was thus impelled to make the confession. It cannot, in my opinion, by any just rule of interpretation, be construed into an admission that he was himself guilty of the murder of Edmund. This being the true meaning of the declaration, if Sam, when Smith was on trial, *had repeated* the false charge against him, the admission made in jail would certainly have been competent testimony to discredit him." This is all the Court decides in reference to the admissibility of these declarations, for the purpose of discrediting the

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witness, and it simply amounts to this, that where a witness has testified to any matter of fact, material to the issue, about which he has made a different statement to others, such statement, if denied by him, may be given in evidence to discredit or impeach him. This proposition is so plain and well settled as not to need this authority to support it, and that this was all the Court intended to decide, is perfectly obvious from what follows, for the learned Judge proceeds to say, that as Sam, in his testimony did not repeat the charge, but denied any knowledge of the participation of Smith in the murder, he was of opinion the admission made in jail "was not testimony for any purpose," and he then adds:—"It appears that Sam, in his testimony, had detailed some facts calculated to connect Smith with the murder, or as stated in the bill of exceptions, 'tending to implicate Smith,' but his testimony as to these *independent facts* could not be impeached by proving that he had previously made a false declaration about Smith which he afterwards recanted, such declarations having *no connection with the facts deposed to*. It is an established rule of the law of evidence, that collateral matters cannot be thus introduced for the purpose of impeaching a witness." But the decision goes still further, and the Judge says:—"Conceding, however, the true meaning of these declarations of Sam in jail to be an admission of his own guilt, and that he had killed Edmund himself, it does not, as I think, *vary the case in the slightest degree*. The question to be ascertained was, whether Smith was guilty of the murder, and any *fact or circumstance* tending to prove that another was the guilty actor would be clearly competent, as its tendency would be to disprove the guilt of the accused. But I think it is perfectly clear that these *declarations* were not *facts* but mere *hearsay*; not made under the sanction of an oath; not obligatory on the person making them; and certainly could not be testimony either for or against any one else."

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In his dissenting opinion, GOLDTHWAITE, J., thought the evidence offered was admissible, but he does not place his decision upon the ground that it was admissible for the purpose of discrediting the witness. He says:—"The effort of the prisoner was to show such a condition of facts and circumstances as to create the impression on the minds of the jury that Sam, in point of fact, was the murderer, the evidence against himself being, as stated, entirely circumstantial. I apprehend, although it may be true, that the confession of a third person of his guilt is not evidence in favor of another when *standing alone*, and unaided by other facts or circumstances, yet that it is so, whenever the party confessing is *connected with the crime by strong presumptive circumstances*." In the present case there is nothing to bring the supposed declaration of Shorb to Grimes within the doctrine even of this dissenting opinion. The declaration, if ever made, stands alone, for the record discloses no facts or circumstances whatever, tending to connect Shorb with the crime. The Alabama case sustains in fact the very opposite position from that for which the appellant's counsel have contended, and we know of no authority nor any rule of evidence that would permit this question to be answered. The witness, in his examination in chief, had made no statement *inconsistent* with the declaration which the question implied he had made in reference to the manner of Wetsell's death and the place where the body was buried and concealed. If he had answered in the negative, he could not have been contradicted, for it is well settled that no question respecting any matter irrelevant to the issue can be put to a witness on cross-examination, for the mere purpose of impeaching his credit by contradicting him, and if any such question be inadvertently put and answered, the answer of the witness is conclusive. 2 *Taylor's Ev.*, sec. 1292. He was not bound to answer in the affirmative if the declaration would tend to inculpate himself, and if he

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chose so to answer voluntarily, then to allow the answer would be to permit his own antecedent declarations when proved by himself as a witness, to go to the jury as evidence to exculpate the prisoner, when it is clear the same declarations could not, for that or any other purpose, be proved by any other witness. To allow the introduction of such testimony would effect a dangerous innovation upon the law of evidence in criminal cases, and open the door to the most fraudulent contrivances to procure the acquittal of parties accused of crime. We therefore entertain no doubt as to the correctness of the ruling in this exception.

*Second Exception.* It was conceded that it became material and competent for the State to prove at what hour the moon rose on the night of Saturday, the 9th of August, 1879, and for the purpose of proving this, the State offered in evidence Gruber's Almanac for the year 1879. The prisoner objected to its admissibility, but the Court overruled the objection and allowed the almanac to be offered for the purpose stated. To this ruling the prisoner excepted.

This is all the exception states in regard to the almanac offered, and we must assume that it contained tables giving the periods of the rising and setting of the sun and moon on each day of the year, such as are usually found in such works. The prisoner did not propose to offer proof assailing or impeaching the accuracy of the astronomical calculations upon which the tables in the particular almanac in question were made, but his counsel contend that the almanac was not the best evidence, nor indeed any evidence as to when the moon rose on that night. The argument is, that it was a mere calculation made by some one long *anterior* to the happening of the event, that the event *would* occur at a certain hour and minute; it was not evidence that the moon *had risen* at a certain hour, but the statement of a *conjecture* that it *would* do so.



On the 2nd of January, 1880, when this case was on trial, there were certainly better and surer means of proving when the moon did *actually* rise on the 9th of August, 1879, than by relying on the computation of an almanac maker that it *would* or *ought* to rise at a given time that night: how is the fact that it *did* rise at a particular hour proved by tendering as evidence the *conjecture* or *calculation* of some one that it would do so?—If Gruber's Almanac is evidence for this purpose, so then are all the other various ones published, because there is nothing in this one to make it more authentic than the others, and thus a fact susceptible of *exact* proof like any other event that has happened, may be established by the unsworn *conjecture* of almanac compilers. We do not propose to elaborate the question, nor to rely upon the fact that the Statute of 24 Geo. 2, ch. 23, is in force in this State. As has been well argued by the Attorney-General in his brief, the precise periods at which the sun and moon will rise or set at any particular period of twenty-four hours *in the future* is as absolutely certain and just as capable of exact mathematical ascertainment, as the occurrence of the day in which such setting or rising will take place. Courts have received as evidence weather reports, reports of the state of the markets, price currents, and insurance tables tending to show the probable duration of human life, though these are records which are not capable of mathematical demonstration, which cannot be tested by any certain law, and which may or may not omit the record of changes which have actually taken place. But an almanac forecasts with exact certainty planetary movements. We govern our daily life by reference to the computations which they contain. No oral evidence or proof which we could gather as to the hours of the rising or setting of the sun or moon could be as certain or accurate as that which we may obtain from such a source. Why then should not these computations, which are, after all, but parts of

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the ordinary computations of the calendar, be admitted as evidence? As was said by Judge COOLEY in considering an analogous question, (*Sisson vs. Railroad Co.*, 14 *Mich.*, 497,) "Courts would justly be the subject of ridicule if they should deliberately shut their eyes to the sources of information which the rest of the world relies upon, and demand evidence of a less certain and satisfactory character." There is clearly no error in the ruling in this exception.

*Third Exception.* From this exception it appears the State proved by Fisher, that he was a witness at the coroner's inquest on the 13th of August, 1879, that after all the witnesses had testified the prisoner was brought in and told that if he desired it, he could have the witnesses recalled, that the testimony of those who had been sworn was read over to him, and when that of Fisher was read to the effect that he had seen the prisoner at Motter's Station on the 5th of August between 10.30 and 11 A. M., the prisoner turned to Fisher and said I think you are mistaken about that, I was at the station about 9 o'clock that morning, and if you consult Mr. Naill you will find I am right, and I can prove that by Harry Rayman and Singleton Dorsey. The State also proved by other witnesses, declarations of the prisoner, that he had arrived at Motter's Station at 9 A. M. on the 5th of August. The prisoner's counsel then called Harry Rayman and asked him whether he had been a witness on the inquest, to which he replied, yes, and then further asked him whether he had not testified on that occasion that he saw the prisoner at Motter's Station on the morning of the 5th of August about 9 o'clock. Offering to show that this witness had previously to the statements and declarations by the prisoner, told a brother-in-law of the prisoner that he had seen the prisoner at the station at that hour, which was mentioned to the prisoner by the brother-in-law. Counsel then stated that this offer was made to show that the statement made

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by the prisoner to Fisher was based upon the statement of Rayman, and that Rayman was in point of fact mistaken about the time, the object being to rebut the charge that the prisoner had attempted to set up an *alibi*, and to show that his mistake was the result of the error of Rayman. The Court sustained the State's objection, refused to allow the question to be asked and answered, and the evidence to be offered, and to this ruling the prisoner excepted.

It is not plainly stated in this exception that the brother-in-law communicated Rayman's statement to the prisoner *before* his declarations at the inquest were made, a fact which, in any aspect of the case, was *essential* to the admission of this evidence. But apart from this we are clearly of opinion the ruling was correct. The statement which the prisoner made at the inquest was the assertion of a *fact* about which he himself had positive knowledge. There is nothing to show he was ignorant of the time he arrived at the station, or that he was not just as capable of judging of it, or ascertaining it, as any one else, and he could hardly have made a mistake of nearly two hours. He positively asserted he was there about nine o'clock, and averred he could prove it as a fact by two or three witnesses. We do not think it was competent for him to escape the damaging effect of a false statement of his whereabouts on that morning, by proving that Rayman had told his brother-in-law he had seen him there at that time, and that the brother-in-law had told him that Rayman had so stated. In our judgment such evidence does not prove or tend to prove that his positive assertions at the inquest were the result of an honest mistake, brought about by the fact that the mistaken declaration of Rayman had first been communicated to him.

Finding no error in the rulings to which the appellant has excepted, it becomes unnecessary to notice the exception taken by the State. These rulings are the only

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matters brought up for review by this appeal. The result is, they must be affirmed, and the cause remanded.

*Rulings affirmed and  
cause remanded.*

(Decided 9th December, 1880.)

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BENJAMIN PERKINS and MARGARET R. PERKINS, his  
Wife *vs.* ELIZABETH A. EMORY. DAVID CARROLL  
*vs.* ELIZABETH A. EMORY, and others.

*Apportionment of an Annuity charged on Real Estate by a  
Will—Costs.*

An annuity having been charged by will on several parcels of real estate devised to one person, the right of the annuitant to enforce the charge against any or all of the property devised, can be waived only by agreement on the part of the annuitant, and is in no manner affected by deeds, mortgages or transactions to which the annuitant was not a party.

Where a cause is remanded under Art. 5, sec. 28, of the Code, this Court makes no disposition of the costs, which are left to the order and direction of the Court below.

APPEALS from the Circuit Court for Queen Anne's County, in Equity.

By his last will and testament, (admitted to probate in Queen Anne's County in 1860,) William Emory devised to his daughter the appellant, Margaret R. Perkins, his house and lot in Chestertown, Kent County; also his dwelling house, store house and shop, and the lot of ground on which they were situate, in the town of Centreville, Queen Anne's county; also as much land laid off of

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his "Newhold Farm," in last named county, as directed by said will, as would make her share of his real estate equal to that of his other children. The part of the said farm so laid off to her, is that known as "Oakwood," and "Ann's Portion."

The testator, by his will, further directed that the appellee Elizabeth A. Emory, his wife, should receive from his real estate, one thousand dollars annually during her life, the same to be a lien upon his real estate, with right of distress for the same, and he did further will and direct, that each child's part of his real estate or land should be charged with the payment annually to his wife during her life, of \$125.00 of said one thousand dollars.

The appellants, Perkins and wife did, by their deed, dated the 15th January, 1867, duly executed and recorded, for the consideration therein stated of \$10,583.75, sell and convey that part of said real estate known as "Oakwood" and "Ann's Portion," unto one William B. Realey; and the deed, after describing said land by metes and bounds, courses and distances as containing 264 acres, 2 roods and 15 perches, is as follows: "and being the same land which was devised to the said Margaret R. Perkins, by her father, William Emory, by his last will and testament—reserving and excepting an annual rent charge to Elizabeth A. Emory, widow of the aforesaid William Emory, for, and during her natural life, unless the said rent charge shall be sooner released, of the annual sum of one hundred and twenty-five dollars."

To secure the balance of unpaid purchase money of \$7000 and interest, Realey and wife on the 1st February, 1867, executed and delivered to Margaret R. Perkins a mortgage of said land, which mortgage Perkins and wife released, and agreed that Realey and wife should execute a first mortgage of said premises to the appellant, one David Carroll, to secure \$5000.00; which mortgage was duly executed on the 9th November, 1867, and also a

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second mortgage on the same day, to Margaret R. Perkins for \$2084.00 and interest. The last mortgage has a recital as to Mrs. Emory's rent charge, which is contained in the Court's opinion.

The annual charge in favor of Mrs. Emory being largely in arrear, she, on the 15th July, 1873, filed her bill of complaint against the appellants, Perkins and wife and Carroll, and William B. Realey, charging the foregoing facts and praying to have the 264 acres, 2 roods and 15 perches, or so much thereof as might be necessary, sold for the payment of the arrears and interest.

The bill was answered by Perkins and wife, admitting the charges in the bill and consenting to a decree for the sale of the real estate as prayed, and by Carroll, who among other things, admitted that the land of the "Newhold Tract," laid off to Mrs. Perkins, was by her and her husband, conveyed to Realey by deed, as stated in the bill, subject to the lien and charge of the complainant for her annuity of \$125.00, under the provisions of the will, and while admitting that the same was so charged, he alleged that the other property devised to said Margaret, the property in Chestertown and Centreville, was also bound for the payment of the annuity, and claiming that he was entitled to have the same apportioned between said properties. On the 16th July, 1877, the following agreement was filed, marked "Exhibit B," and signed by the solicitors of the respective parties:

"It is hereby agreed, by and on behalf of the parties to this cause, that a statement of the complainant's claim, showing the amount due and in arrear thereon up to the 1st January, 1877, after allowing and deducting all credits and discounts verified by the oath of B. B. Perkins, and certificate of W. J. Gibson, shall be accepted and filed as evidence in this cause; that the defendant, David Carroll, sold under a mortgage from the defendants, Perkins and wife, the house and lot mentioned in the complain-

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ant's bill located in Chestertown, on the 2nd July, 1872, at and for the sum of \$1760, which is admitted to be the full value thereof, and which, after deducting the expenses of sale, distributed to said mortgage as of the day of sale, the net sum of \$1528.99, received by the said Carroll, and a proper credit upon the mortgage from the defendant, William B. Realey, to the said Carroll, mentioned in these proceedings; that the defendant, Margaret R. Perkins, claims now to be, and has continued since the death of her father, the owner, under her father's will, of the dwelling house, store house and shop, and lot of ground in Centreville, mentioned in the complainant's bill, and that the full value thereof shall be regarded to be for the purposes of this agreement, the sum of \$1700. That the answer of David Carroll, filed on the 11th November, 1873, shall be regarded and accepted as the answer of the defendant, W. B. Realey, also to the complainant's bill; that a decree shall forthwith pass for the sale of the land mentioned in the complainant's bill as the land conveyed by the said Perkins and wife to the said Realey, and that the proceeds of said sale shall be distributed in this cause under the order and direction of this Court, and that said proceeds of sale shall be liable for whatever amount or proportion of the complainant's claim this Court shall apportion to the land conveyed to Realey, and to the house and lot in Chestertown, sold under the mortgage to Carroll, and that the net balance of said proceeds of sale, and the residue of said purchase money, if any, shall be allowed to the said Carroll, on account of his mortgage claim, to the extent thereof, and the dwelling house, store house and shop, and lot of ground in Centreville, mentioned in the complainant's bill, shall be subject to the further order and decree of this Court in the premises. It is further agreed, that the exhibit filed with the complainant's bill, (the will of William Emory) shall be accepted and regarded as evidence in this cause."

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And on the same day a decree was passed for the sale of the land, known as "Oakwood" and "Ann's Portion."

The land was sold, and the proceeds of sale were brought into Court for distribution.

The Auditor stated two accounts: In "Account No. 1," after allowing expenses and costs, he allowed the whole of the accrued charge to Mrs. Elizabeth A. Emory, and the balance of sales being insufficient, annually, to produce at six per cent., an amount equal to the annual charge, reported the balance for the future order of the Court; and in "Account No. 2," after allowing expenses and costs, he apportioned said accrued charges among the three parcels of property, allowed to Mrs. Emory those which should be charged to the Chestertown property and the "Oakwood" and "Ann's Portion" property respectively, and having capitalized so much of said annual charge as he deemed chargeable to said two pieces of property, allowed the same to Mrs. Emory, and the balance of sales to Carroll on his mortgage debt. Carroll excepted to Account No. 1, and Mrs. Emory, and Perkins and wife, excepted to Account No. 2.

On the 2nd April, 1879, the Court, WICKES, J., filed the following opinion:

"The late William Emory, by his will, bequeathed to the complainant an annuity of one thousand dollars during her life, which he charged upon the real estate devised to his children. A portion of this annuity, namely, the sum of one hundred and twenty-five dollars, is expressly charged by the testator upon the real estate devised to Mrs. Margaret R. Perkins, one of the defendants. A part of the property which Mrs. Perkins conveyed to William B. Realey, has been sold under the decree in this case, and the question presented is, whether the whole amount due to Mrs. Emory, on account of her annuity, which has been in arrear for several years, shall be paid out of this fund, and the residue invested to meet the future accruing



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annuity, or whether the proceeds of sale shall only bear a proportionate part of the burden.

"Mrs. Emory was not a party to the deed from Perkins and wife to William B. Realey, or to the mortgages executed by Realey to David Carroll and to Mrs. Perkins, and she cannot, therefore, be bound by any stipulations contained in these deeds which relate to her annuity, or which seek to modify in any manner her rights derived from the will of her husband.

"But we understand from the agreement filed in the case, marked "Exhibit B," that Mrs. Emory waives this exception, and to avoid future litigation, is willing that the Court, in deciding this case, shall consider the equities existing between David Carroll and Mrs. Perkins, and their conflicting claims in reference to the payment of her annuity. It is contended, that in the deed from Perkins and wife to Realey, executed on the 15th of January, 1867, there is an express agreement that Realey shall pay the whole of the annuity charged on the land devised to Mrs. Perkins, and that the mortgage from Realey to Carroll being subsequent to the deed, was taken subject to that claim. This construction of the contract between the parties cannot, in our opinion, be sustained. After describing the property conveyed, by metes and bounds, and as 'being the same land which was devised to the said Margaret R. Perkins by her father, William Emory,' the deed has the following clause: 'Reserving and excepting an annual rent charge to Elizabeth Emory, during her natural life, of the annual sum of one hundred and twenty-five dollars.' Had these words been omitted, the charge would still have rested upon the land. By inserting them in the deed, it was not intended to create a new obligation, having no existence without them, but they were merely descriptive of the existing condition of the property, which Mrs. Perkins conveyed to Realey. They are not words of agreement, but only describe the obliga-

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tion to which Realey would be liable to Mrs. Emory. (*Wake vs. Barroll and Spence*, 8 *Gill*, 288.)

“But assuming that the deed imposed upon Realey the obligation to pay the whole of the annuity, it was an agreement which the parties thereto could at any time modify or annul. The first mortgage from Realey to Mrs. Perkins, to secure the purchase money of the farm, was executed February 1st, 1867. On November 5th, 1867, a release of that mortgage was executed, in which release it is recited, that for the *convenience* of Mrs. Perkins, Realey had agreed to divide the debt and to execute two mortgages in lieu of the first. On the 9th of November, 1867, a few days thereafter, the mortgage to Carroll for \$5000, was executed by Realey, in which it is stated, that it was for a part of the purchase money of the land. On the same day, another mortgage was executed by Realey to Mrs. Perkins, to secure the payment of \$2084, the balance of the purchase money, which was not *recorded* for some weeks *after* the mortgage to Carroll. The whole transaction shows that the change in the securities, was made for the accomodation of Mrs. Perkins, who, it is reasonable to suppose, received the \$5000 advanced by Carroll. Under these circumstances, we think it was the intention of the parties to these deeds, to secure as far as they were able, the payment of \$5000 to Carroll, in preference to any claim which Mrs. Perkins had on the farm, and not to throw the whole burden of the annuity on the farm, and thereby to entirely relieve the Centreville property.

“By the agreement to which we have referred, the purchase money of the farm is to bear not only the proportion of the complainant's claim for the arrears of her annuity properly chargeable on the farm, but also that portion with which the property in Chestertown is chargeable, as Mr. Carroll has heretofore received the whole of the net proceeds of sale of that property; and the balance of the proceeds, or so much thereof as may be necessary, is

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to be charged with the same proportion of the annuity as it may hereafter become due. For these reasons we are of opinion that the complainant's claim for her annuity now in arrear, with interest, should be paid by the respective portions of property, in the proportion of their relative values, and that her future annuity should be paid in the same manner.

"It was the manifest intention of the testator to secure to his widow an annual sum during her life for her support, and the defendants have no right to require her to accept a gross sum in satisfaction of this provision. Her claim is paramount to the interest of the defendants, and it is proper that the annuity should be secured to her. Being a charge on the land, the money realized from a sale of the property should be made to furnish the same security. This can be done by directing so much of the proceeds of the sale to be invested, as will be necessary to raise the portion of the annuity with which the fund should be charged; the principal, at the death of Mrs. Emory, being payable to the party entitled thereto. (*Buchanan vs. Deshon*, 1 H. & J., 280; *Payton vs. Ayers*, 2 Md. Chy. Dec., 64.)

"Understanding the agreement of the parties, as we have stated, we have forborne to express any opinion as to Mrs. Emory's right, had that agreement not been made, to have the whole of her claim paid out of the fund now in the hands of the trustee.

"We will, therefore, sign an order sustaining the exceptions to both of the auditor's accounts, and referring the case to him, with instructions, to state an account in conformity with these views."

Whereupon under the order of Court, (WICKES and STUMP, J.,) the auditor stated an account (filed the 23rd April, 1879,) in accordance with the views expressed in the foregoing opinion. It was excepted to by the appellants Perkins and wife, but was ratified by the Court by

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its order of the 15th May, 1879. From these orders, Perkins and wife and David Carroll respectively appealed.

The cause was submitted to BARTOL, C. J., BOWIE, MILLER, ALVEY, ROBINSON and IRVING, J.

*J. B. and E. H. Brown*, for the appellants, Benjamin Perkins and Margaret R., his wife.

*D. C. H. Emory*, for the appellant, David Carroll.

*Thos. J. and B. P. Keating*, for the appellee, Elizabeth A. Emory.

BARTOL, C. J., delivered the opinion of the Court.

By the last will of the late William Emory the husband of the appellee, the *three* pieces of property devised to the appellant Mrs. Perkins, who was the testator's daughter, were charged with the payment of \$125 *per annum* to Mrs. Emory. The annuitant not having been a party to the deed from Perkins and wife to William R. Realey, or to the mortgage from Realey to Carroll, her rights were in no manner affected thereby; but she was entitled notwithstanding those transactions, to enforce her charge against any or all of the property devised to Mrs. Perkins. It appears however from the proceedings that she has agreed, the payment of the arrears of her annuity, and of amounts payable to her in the future, may be enforced against the several parcels of property in their just and equitable proportions, in such manner as may be conformable to the equitable rights of Perkins and wife and Carroll, growing out of the transactions between those parties. This we understand to be the substance and effect of the agreement "Exhibit B," contained in the record.

If the deed from Perkins and wife to Realey stood alone, we should be inclined to construe it as intending to subject

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the land thereby conveyed, to the payment of the whole of Mrs. Emory's annuity, to the exoneration of the Chestertown and Centreville property; and as a consequence the mortgage of Carroll would be subject to the same burden. But conceding that such would be the true construction of the deed, it is very clear that this arrangement was modified by the subsequent transactions between the parties.

It appears that on the 1st day of February, 1867, a few days after the deed, Realey executed a mortgage of the land in favor of Mrs. Perkins, to secure the payment of \$7000, and interest, being for the purchase money of the land. Afterwards, on the 9th day of November 1867, Perkins and wife having released the mortgage of Realey, the latter executed a mortgage of the same land to David Carroll for \$5000, which as therein recited, it was agreed should be a *first mortgage* of the land; and on the same day Realey executed a *second mortgage* of the same property in favor of Mrs. Perkins, to secure the payment of \$2084, the balance of purchase money due by him. In the last-mentioned mortgage it is recited: "whereas Elizabeth Emory, widow of William Emory, late of Queen Anne's County aforesaid, deceased, has an annual rent-charge upon the land and premises above described, of the sum of one hundred and twenty-five dollars; it is further provided that the said William B. Realey may at his option, defer the payment of the said sum of \$2084, for and during the natural life of the said Elizabeth Emory, unless the rent-charge shall be sooner released; the said William B. Realey paying the interest thereof to the said Elizabeth Emory, and charging the same against any interest due the said Margaret R. Perkins, anything herein contained to the contrary notwithstanding. But it is expressly hereby provided, that if the said Elizabeth Emory shall at any time release the rent-charge aforesaid, that then the said last mentioned proviso shall be void and of no force or virtue in law."

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It is obvious that the intent of the parties in these transactions, as far as they were able to do so, was to give to *Carroll* a *first* mortgage upon the property free and clear from the charge of Mrs. Emory's annuity, and to transfer the charge from the land, to the balance of purchase money due from Realey. So far as the claim of Mrs. Emory is concerned, her right to subject the property to the charge of her annuity was not impaired or affected, she being no party to the transaction. But as between Mrs. Perkins and Carroll the mortgagee, there is no equitable ground upon which the former can claim that the whole burden of the annuity shall rest upon the farm; and that her property in Centreville shall be exonerated. As between Mrs. Perkins and Carroll, his mortgage is entitled to be exempted from the charge of the annuity, so far as the property of Mrs. Perkins in Centreville may suffice for that purpose.

It appears that Carroll held also a mortgage of Mrs. Perkins' property in Chestertown, as a security for the \$5000, due him, from which he received the sum of \$1528.99. It was proper therefore for the auditor, under the agreement "*Exhibit B*," to charge the proceeds of the farm with the proportion of the annuity, chargeable upon the Chestertown property, before allowing for the payment of Carroll's mortgage. To this part of the auditor's account of April 23rd 1879, ratified by the Circuit Court, the appellant makes no objection. We think there was no error in the decision of the Circuit Court, or in the principles upon which the auditor's account of April 23rd was stated—whereby the sum payable on account of the annuity in arrear, was apportioned ratably between the three parcels of property devised to Mrs. Perkins;—charging upon the proceeds of the land sold the proportion chargeable thereon, and on the Chestertown property, and leaving the property in Centreville still liable for its ratable proportion, according to the agreement of the parties.

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The annuity being given to Mrs. Emory during her life, she is entitled to have the same secured to her, by setting apart a sufficient sum to be invested, so as to yield in accruing interest the amount of her annuity. *Buchanan vs. Deshon*, 1 *H. & G.*, 280, 298.

There is nothing in the agreement "*Exhibit B*," by which she has waived this right, or consented to receive in lieu of her annuity a gross sum regulated according to her age and health, in accordance with the chancery rule which prevails in cases of dower. On this question we concur in the decision of the Circuit Court, and the auditor's report stated in conformity thereto is in this respect correct.

We find however that in ascertaining the proportion of the arrears of the annuity chargeable on the Chestertown property and the farm, the auditor has committed an error. In the audit of April 23rd, he states this to be \$810.61. We find by a careful calculation, that the correct amount is \$778,—leaving \$311.84 as the proportion chargeable on the Chestertown property.

But the order of the Circuit Court cannot be reversed on account of this error; it not having been made a matter of exception to the auditor's statement. It is proper however that the error should be corrected; and to that end, as also to enable the appellee to enforce her claim against the property of Mrs. Perkins in Centreville, the cause will be remanded to the Circuit Court, under Article 5, section 28, of Code. In such case no disposition of the costs is made in this Court, but the same is left to the order and direction of the Circuit Court. *Doub vs. Mason*, 5 *Md.*, 613, (*Appendix*.)

*Cause remanded.*

(Decided 9th December, 1880.)

## STATE OF MARYLAND vs. GEORGE W. WADE.

*Practice in Criminal Cases—Dismissal of Assignment of Errors—Motion to Quash an Indictment—Demurrer under Art. 30, sec. 82, of the Code.*

The quashing by the Court below of an indictment on the motion of the defendant being a final termination of the prosecution upon the particular indictment, the defendant was discharged from all further proceeding thereon, and a motion by the defendant in error in this Court to dismiss the assignment of errors must be overruled.

Where a motion is made to quash an indictment for certain supposed defects or legal insufficiencies apparent upon its face, and which would, if the objections taken be well founded, be the proper subject of demurrer under Art. 30, sec. 82, of the Code, such motion should not be entertained by the Court below.

## APPEAL from the Circuit Court for Baltimore County.

The defendant in error was, in 1879, one of the officers of registration of the State of Maryland, duly appointed and qualified in and for the thirteenth election district of Baltimore County, and while such officer, he was in December, 1879, indicted in the Circuit Court for said county, for an alleged violation of sec. 12 of the Act of 1876, ch. 249.

On the 8th April, 1880, at the call of the case for trial, the defendant moved the Court to quash the indictment on the ground that it was insufficient in law, and that it was irregular and illegal. The motion was granted and the indictment quashed. The State filed its petition for a review of the judgment of the Court below, and the record of proceedings was accordingly transmitted to this Court.



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The cause was argued before BARTOL, C. J., MILLER, ALVEY and ROBINSON, J.

*Charles J. M. Gwinn, Attorney-General*, for the appellant.

It is apparent upon the face of the record that the Court below quashed the indictment in this case for insufficiency in law. Any such cause might certainly have been a subject of demurrer to the indictment. 1 *Stark on Cr. Plead.*, 315. It is expressly provided by section 82 of Article 30 of the Code, that no indictment shall be quashed for any matter, or cause, which could have been a subject of demurrer. *Cowman vs. State*, 12 *Md.*, 253; *Maguire vs. State*, 47 *Md.*, 494.

*R. R. Boarman*, for the defendant in error.

The record does not disclose, and there has in fact, been no such final judgment in the case, as to warrant its presence here for review. There has been no other judgment of the Circuit Court, than that sustaining the motion to quash. This judgment is no more than interlocutory, and the case still stands against the accused. Granting that the State's Attorney had not the right, under the Code, to amend his indictment, he had the right to prepare and have presented, a new indictment, or begin the prosecution anew. There has been no final determination of the case in the lower Court, and until then no appeal or writ of error will lie. *Kearney vs. State*, 46 *Md.*, 422.

Should the Court determine that the case is properly before it for review, it is submitted that the judgment of the Court below was correct. *Rex vs. Marshall, R. & M.*, 158; *Kearney vs. State*, 48 *Md.*, 16; *Wharton's Am. Crim. Law*, (4th Ed.,) Secs. 261-276.

ALVEY, J., delivered the opinion of the Court.

It requires but little to be said in regard to this case. The defendant in error has made a motion to dismiss the

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assignment of errors, because, as he insists, there has been no final judgment of which error could be predicated. The record shows that the indictment was quashed by the Court below upon the motion of the defendant. That was a final termination of the prosecution upon the particular indictment, and the defendant was necessarily discharged from all further proceeding thereon. Whether the State may proceed on another indictment would depend upon the action of a future grand jury. It is the right of the State to have the defendant tried upon the present indictment, unless it be determined, in some legal and proper manner, that the indictment is legally insufficient. The motion to dismiss therefore must be overruled.

It appears that the indictment was quashed for certain supposed defects, or legal insufficiencies, apparent upon its face, and which would, if the objections taken be well founded, be the proper subject of demurrer. This being so, the Code, Art. 30, sec. 82, provides that "no indictment or presentment for felony or misdemeanor *shall be quashed*" for certain specified causes or defects, "nor for any *matter or cause* which might have been a subject of demurrer to the indictment or presentment." The Court, therefore, was plainly in error in its ruling upon the motion to quash. *Cowman vs. The State*, 12 Md., 250; *Maguire vs. The State*, 47 Md., 485. The question of the legal sufficiency of the indictment not being before us, we forbear expressing any opinion in regard to it, but shall simply reverse the judgment and remand the case for further proceedings.

*Judgment reversed, and  
cause remanded.*

(Decided 9th December, 1880.)

ISRAEL REIFF *vs.* ANNA HORST and others.

*Appeal under Secs. 21 and 22 of Art. 5, of the Code—Inchoate Right of Dower—Allowance to Wife in consideration of having united with her husband in a Deed of Trust and Mortgage.*

Where on a former appeal a cause had been remanded by this Court to have an account reformed and re-stated, an appeal subsequently prayed from an order of the Court below "ratifying an auditor's account stated the 10th July, 1880, under an order of Court passed the 7th June, 1880, and from all action had herein respecting the said account and the distribution therein made, and all proceedings subsequent to the remanding of the cause by the Court of Appeals," was well taken under secs. 21 and 22, of Art. 5, of the Code, as such prayer of appeal embraced an appeal from the order of the Court below, whereby the exceptions to a former audit were passed upon, and the audit stated in accordance with the appellant's instructions was set aside, and the opinion of the Court establishing the principles by which the audit was to be controlled, and the question of right between the parties was settled; these being proceedings had in the cause after it was remanded from this Court.

The interest of the wife in her husband's real estate is inchoate only during his life. It requires the husband's death to occur before it becomes a vested right. The wife's inchoate right is not such a right as may be bargained and sold. Her deed does not pass any title. It operates only by way of estoppel or release, and any words of release would be as effectual as words of grant. She cannot convey it to a stranger. It is only released to the owner of the fee. There is no scale or standard for ascertaining the present worth of a wife's inchoate right of dower.

A deed from H. in which his wife united, conveyed all his property to trustees for the benefit of his creditors. The deed provided for the payment to the wife, in consideration of her uniting in the deed, of one-twelfth of the gross proceeds of the sale of the real estate thereby conveyed in trust, in lieu of her contingent right of dower therein. The wife had previously united with H. in several mortgages of his

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real estate, one of them being to the same parties afterwards trustees in the deed of trust; there was, however, one piece of land not mortgaged which passed by the deed of trust. The grantees in the deed sold the property as therein provided. In the distribution of the proceeds of the real estate, it was HELD:

- 1st. That though the wife could not bind H's creditors (except such as were parties to the agreement,) to pay her from his estate, for her contingent right of dower, just such sum as she might have stipulated with H. and his trustees should be paid for uniting in the deed, and which was accordingly reserved therein; nevertheless, considering that the wife had barred herself in the larger part of the estate by uniting in the mortgages, and had united in the deed of trust, in the expectation of receiving an allowance from the whole estate, it was equitable she should receive the twelfth part of the proceeds of sale of the piece of land not mortgaged, after paying its proportion of the costs of the case, as an allowance to her for her release of expectant right of dower in that parcel.
- 2nd. That the wife should also be allowed the twelfth part of the sum awarded to the mortgage of the trustees, they being bound by the agreement contained in the deed of trust.

APPEAL from the Circuit Court for Washington County, in Equity.

The former appeal in these proceedings is reported in 52 *Md.*, 582. After the cause was remanded, the final report of sales made by Israel Reiff and John Horst, surviving trustees, was filed the 12th November, 1879, and on the 17th December, 1879, account No 2, mentioned in the report in 52 *Md.*, was re-stated, and also special auditor's accounts, as per the instructions of the solicitor of Reiff and Horst as creditors, were stated. To these accounts exceptions were filed by Anna Horst, and by Reiff and Horst, as creditors, and others. Finally on the 7th June, 1880, the Court, (MOTTER, J.,) ordered, upon consideration of the exceptions of Anna Horst, and of Reiff and Horst and others, to the audits, official and special, filed in the cause the 13th December, 1879, that the said audits, and each of them, be rejected, and the papers be remanded to

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the auditor to state a new account and accounts, in conformity with the views of the Court's opinion, filed 7th June, 1880.

Whereupon on the 10th July, 1880, the auditor stated an account, which so far as the same concerns the present appeal, was as follows: He charged the trustees with the entire proceeds of the real estate sold by them, as per their final report filed the 12th November, 1879. He credited them with commissions—the same costs, expenses, &c., allowed in his official audit in the preceding account, as per order of the Court, and also with the costs of this account. He then allowed to Mrs. Anna Horst the one-twelfth of the gross proceeds of sale, as he considered it to be provided in the deed of trust. He then distributed the net residue of the proceeds of sale, interest thereon and proceeds of crops in the priorities allowed in his official audit, filed the 13th December, 1879. The result was, that after the allowance of the inchoate right of dower to Anna Horst, as in his opinion it was provided in the deed of trust, Mary W. Miller was paid her judgment in full, and a balance distributed to one Michael Horst, in part payment of his mortgage. The auditor did not follow strictly the order of the Court as to the manner of stating the account, but suggested that the result was the same as if the order had been literally pursued. He did not ascertain the amount to which Mary W. Miller was entitled under the decision of the Court of Appeals, allowing to Mrs. Horst only the value of her inchoate right of dower, instead of the one-twelfth of the gross proceeds of sale, because it was already ascertained, (as per preceding official audit,) that after allowing to her the value of her inchoate right of dower in the surplus remaining, after paying the mortgages in which she united, the judgment of Mary W. Miller was paid in full, and a balance was distributed to Michael Horst, the next lien holder, in part payment of his mortgage. The audi-

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tor reported that, if the first account, directed by the Court, was stated, Mary W. Miller was entitled to receive full payment of her judgment, free from the incumbrance of the inchoate right of dower of Anna Horst, an amount she would have been entitled to, if Anna Horst had not joined in the deed of July, 1876; and that it appeared, she received the same amount by this account, and from the second account directed by the Court.

The auditor further stated that, as he understood the opinion of the Court and its order, he was directed to allow one-twelfth of the gross proceeds of sale to Mrs. Horst, in lieu of her inchoate right of dower, reserved in the deed of trust, except in so far as Mary W. Miller was concerned; and that it was shown that her judgment was not affected by the claim for inchoate right of dower, there being sufficient funds to pay the same, after the allowance of inchoate dower in the surplus remaining after payment of mortgages in which Mrs. Horst united.

This account was finally ratified by order of Court, passed the 26th July, 1880. On the 9th September, 1880, Israel Reiff prayed an appeal in the manner and form set forth in the opinion of this Court.

The cause was submitted for the appellant, and argued for the appellees, before BARTOL, C. J., BOWIE, MILLER, ALVEY and IRVING, J.

*Albert Small*, for the appellant.

*T. H. Edwards*, for the appellees.

IRVING, J., delivered the opinion of the Court.

The motion to dismiss this appeal cannot prevail. By section 22 of Article 5 of the Code of Public General Laws, it is provided, that "on an appeal from a final order all previous orders which may have passed in the cause shall be open for revision in the Court of Appeals, unless an

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appeal under the next preceding section may have been previously taken to such order." In the 21st section, which is "the next preceding section" referred to, one of the things from which an appeal may be taken and for which that section provides, is "an order determining a question of right between the parties, and directing an *account to be stated* on the principle of such determination." The prayer for appeal in this case is not only from the order of ratification of the auditor's account stated July 10th, 1880, under the order of the Court, passed June 7th, 1880, but also "from all action had herein respecting the said account and the distributions therein made, and all proceedings subsequent to the remanding of the cause by the Court of Appeals of Maryland." This prayer of appeal therefore by its express terms is sufficient to embrace an appeal from the order of the Court, whereby the exceptions to the former audit were passed upon, and the audit stated in accordance with the instructions of the appellant's counsel was set aside, and the opinion of the Court establishing the principles by which the audit was to be controlled and the question of right between the parties was settled. All these were proceedings had in the cause after the same was remanded from this Court on the former appeal. In disposing of the questions raised on the other audits, the Court determined the question adverse to the view of the appellant, and by its order directed an account to be stated, in accordance with the principle so fixed by the Court. Under such circumstances therefore it was not indispensable to the consideration of the objection now made to this audit, which has been finally ratified, that a formal exception should have been made thereto. The audit appears to have been made in pursuance of an order directing its mode of statement, which order was the determination of a question already before the Court, and was the subject of appeal, and is, by the prayer of appeal, appealed from. In our opinion

therefore there is no ground for dismissing the appeal. The only question made and relied on by the appellant is, that in the order directing the account to be stated, and in the account accordingly stated, Mrs. Horst has been allowed a sum in lieu of her inchoate right of dower in the property sold and being distributed, which was not warranted by the principles established by this Court on the former appeal, and which was directed by the opinion remanding the cause to be observed in the statement of the account. The interest of the wife in her husband's real estate is *inchoate only* during his life, it requires the husband's death to occur before it becomes a vested right. As this Court defines it in *Buchanan vs. Deshon*, 1 H. & Gill, 280, "she has no vested right, it is altogether contingent, depending upon her surviving her husband." In *Hawley vs. Bradford*, 9 Paige, 201, the Chancellor says: "Strictly speaking, the wife has no interest or estate in the lands of her husband *during his life*, which is capable of being mortgaged or pledged for the payment of his debt. Her joining in a mortgage therefore merely operates by way of release or extinguishment of her future dower as against the *mortgagor*, if she survives her husband, but without impairing her contingent right of dower in the equity of redemption. If the mortgage be foreclosed in the life-time of the husband, she has no claim on the surplus proceeds of sale; but if her husband be dead when foreclosure takes place her dower right in the equity of redemption having then become consummate, she would be endowed of the surplus proceeds." 1 *Scribner on Dower*, 478; 5 *Johnson's Ch. Rep.*, 452. In the last cited case, Chancellor KENT says, it is very clear this is the law. It results from these authorities that the wife's inchoate right is not such a right as may be bargained and sold. Her deed does not pass any title. It operates only by way of estoppel or release. And any words of release would be as effectual as words of grant.



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She cannot convey it to a stranger. It is only released to the owner of the fee. 1 *Washburn on Real Estate*, 247 and 301, and the authorities there cited. The decision of this case on the former appeal, was not intended to conflict with these well established principles; nor, as the opinion in that case was intended to be understood, does it establish for the settlement of the equities in this case any rule not in harmony with those principles. This Court decided that having united in the several mortgages mentioned in the record, she had released her interest in the lands conveyed by these mortgages, and was therefore against the mortgagees and judgment creditors, entitled to no allowance except as against the appellants Reiff and Horst. They were held to have waived their mortgage by the acceptance of the deed of trust, by the terms of which they were bound, and Mrs. Horst was entitled as against them in equity to the one-twelfth of the sum allowed them for their mortgage claim. This allowance to her was regarded by the Court as a consideration which they agreed should be paid to her for signing that deed. So far as Mary W. Miller and all other persons having claims in like condition, (regarding Mrs. Miller as a representative creditor,) it was held that so far as they had claims which could be enforced as liens on the lands which were mortgaged, and in which mortgages Mrs. Horst had joined, those claims would not be affected by any supposed right of Mrs. Horst in lieu of inchoate dower. There was however one piece of land not covered by any mortgage which did pass by the deed of trust, in which the reservation of one-twelfth of the proceeds was made to Mrs. Horst; and this Court thought that inasmuch as Mrs. Horst had manifestly joined in that deed under the supposition that she would receive compensation for so doing, according to the terms fixed by the deed, it was equitable not to hold her to the consequences of signing that deed without doing equity by her according to some fair rule. Regarding

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her right, as the law does, during the husband's life, as having no present value, as it is not the subject of sale, but only of release to the owner of the fee, we have no scale or standard for ascertaining its present worth. As a rule a wife could not be held as binding the creditors of her husband to pay her from his estate, for her contingent right of dower, just such sum as she may have stipulated with her husband or his trustees should be paid for uniting in the deed, and which was accordingly reserved in the deed; and we repeat what was said in the former opinion delivered in this case, that to so hold "would be opening a wide door to abuse, if not fraud." It is very certain that only such creditors as might be parties to the agreement ought to be bound by it, under ordinary circumstances. In this case however, looking to its peculiar circumstances, wherein the wife had barred herself in the larger part of the estate by joining in the mortgages, and had finally united in the deed of trust, with manifest expectation that she was to receive an allowance from the whole estate; and considering the very small value of the parcel which alone is subject to the charge, we think the twelfth part of the proceeds of sale of that parcel, after paying its proportion of the costs of the case, would not be an unreasonable allowance to her as a *consideration* for her release of expectant right in that parcel. Though not the subject of grant, her right, peculiar as is its character, is the subject of contract for release. The parcel, which was not included in any of the mortgages, and which was intended by the former opinion and decision to be charged with allowance to her, and which is now directed to be so charged, is that piece of mountain land purchased by Mrs. Horst, and is so designated by the auditor in the first audit contained in the record considered by this Court on the former appeal. Viewing the auditor's report, made and stated in accordance with the opinion and direction of the Court below, in the light of the principles herein

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announced, it is very evident that the learned Judge did not clearly apprehend the meaning of this Court in its former opinion on the subject. In that audit Mrs. Horst is allowed the one-twelfth part of the proceeds of sale, amounting to the sum of \$1702.90; whereas, according to the true construction of the opinion, and the law of the case, she should only have been allowed the one-twelfth part of the sum awarded to the mortgage of Cearfoss; Reiff and Horst; and the additional sum of one-twelfth of the net proceeds of sale of the piece of mountain land not embraced in any of the mortgages signed by her. There being no other matter before us on this appeal except the allowance to Mrs. Horst, the order ratifying the audit will not be disturbed in any particulars except those specified in this opinion. The order ratifying the audit will be reversed, and the cause will be remanded, to the end that the audit may be corrected in accordance with the directions of this opinion; and that so much of the money erroneously allowed to Mrs. Horst, in that audit, may be awarded to the claimants who would and should have taken it, if the error had not been committed.

*Order reversed with costs,  
and cause remanded.*

(Decided 9th December, 1880.)

TOBIAS ECKENRODE vs. THE CHEMICAL COMPANY OF  
CANTON OF BALTIMORE COUNTY.

*Damages for Failure and Refusal to comply with a Contract—  
Questions of Evidence—Contract made by an Agent of a Cor-  
poration not appointed as prescribed by the Act of 1868,  
ch. 471.*

On the 15th May, 1879, at Taneytown, Md., the appellee and the appellant entered into the following contract:

"We have this day contracted with Mr. T. H. Eckenrode, of this place, for the manufacture of two hundred tons of phosphate, by his formula, and to be branded with his brand. The goods to be manufactured between July 15th and July 30th, 1879. T. H. Eckenrode is to superintend the making of it. The goods are sold to him on the following terms, viz: He is to give his notes, one payable the 1st October, 1879, with interest; the other payable the 1st January, 1880, and to bear interest from the 1st October, 1879. The goods are to cost twenty-five dollars per ton. He has the privilege of increasing above order one hundred tons more, if done before the 20th July:" which was signed by the appellee, per "W. C. Matheson, Agt."

"I accept the goods on above terms and conditions:" signed by the appellant.

On the 1st July, 1879, the appellant was at the place of business of the appellee in Baltimore, and went with the appellee's secretary to their manufactory, where a dispute arose as to how the phosphate should be made, he insisting that what is termed the dry process should be followed, and they that the wet process was as good, and it was finally proposed and agreed that a ton should be made by the latter process, so that the appellant could examine it as a sample; on the afternoon of the same day the appellant went to the appellee's office, where their president was also present, and the sample was shown him, and he said he would not have an article of that kind, and would not accept such an article if it was made by the appellee, and that he countermanded his order for making said phosphate by the appellee; the president replied that he would not agree to this, and would hold the appellant to said

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contract, and that if the appellant would not agree to the appellee's making the phosphate appellee's way, the appellee would make it appellant's way, or any way he wanted it. The appellant replied he had countermanded his order and would have no more to do with it. On the 25th July, the appellee's secretary wrote the appellant that he still had five days time in which to complete his contract with the appellee, and that the appellee was prepared to fill their part of the contract as called for, and notified him that they had the goods as called for on hand, and had had them since the 1st July, 1879. To this the appellant replied, by repeating substantially what he had before said. In an action brought by the appellee on the 9th August, 1879, to recover damages from the appellant, in consequence of his failure and refusal to comply with the contract, it was HELD:

That the appellee could maintain the action, and that the measure of damages was the difference between the cost of manufacturing the article according to the contract, and the price the appellant agreed by that contract to give for it.

Evidence offered by the appellee as to what the appellant said to the appellee's secretary on the 1st July was admissible, as tending to show that the appellant was then unwilling to comply with his contract, and to explain his reason therefor, and his subsequent countermanding of the order and repudiation of the contract; and it was competent for the appellee to prove that after the 1st July, the appellant never went to appellee's office or manufactory to superintend the making of the phosphate.

Evidence offered by the appellant to show what was the understanding between the appellee's agent and the appellant at the time the contract was made, in reference to the appellant's superintending the manufacture of the phosphate, and for what purpose and with what intent the clause as to such superintendence was inserted in the contract, was inadmissible.

The letter written on the 25th July, by the appellee's secretary to the appellant, produced by the appellant upon notice, was admissible in evidence.

The appellant offered to prove by L. that in September, 1879, he applied to the appellee to buy a quantity of S. C. bone, and was told by the appellee that they had none on hand. On objection, it was HELD:

That the evidence offered was irrelevant and inadmissible.

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The appellant, on cross-examination of a witness for the appellee, asked him: what was the lowest price at which plaintiff sold any ton of phosphate manufactured by plaintiff during July, 1879? On objection, it was HELD:

That the question should not be asked or answered.

Where an offer is made generally of a mass of testimony complex in its character, and the whole of it is objected to, it is error to exclude the whole if any part of it is admissible; but in such case it must appear that some part of the testimony offered is clearly admissible.

A valid contract binding upon a corporation may be made by an agent not appointed as prescribed by the Act of 1868, ch. 471, as not only the appointment but the authority of the agent may be implied from the adoption or recognition of his acts by the corporation or its directors.

APPEAL from the Circuit Court for Carroll County.

The case is stated in the opinion of the Court.

*Exceptions.*—At the trial it was admitted that the defendant was a corporation incorporated under the Act of 1868, ch. 471, the General Incorporation Law of the State of Maryland.

*First Exception.*—The plaintiff then offered to prove that the paper set forth as the contract in the opinion of the Court, was in the hand-writing of W. C. Matheson, and that the signature thereto was in his hand-writing, and that the signature of defendant was in defendant's hand-writing, and that said Matheson was an agent of plaintiff and was appointed by the secretary of plaintiff, with the approval of the president of plaintiff, and that said appointment was made verbally and approved by said president verbally. The defendant objected to the competency and admissibility of said proof offered. The Court, (HAYDEN, J.) overruled the objection and permitted the proof offered to be given to the jury. The defendant excepted.

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*Second Exception.*—The plaintiff then gave in evidence the facts in offer of proof in first exception, and offered to read in evidence the said paper as and for a contract between plaintiff and defendant. The defendant objected. The Court overruled the objection, and permitted the same to be given in evidence, as and for a contract as aforesaid. The defendant excepted.

*Third Exception.*—The plaintiff then proved by the defendant as a witness, that at the time of the execution of said paper, the defendant gave to said Matheson the formula referred to in said paper and which was endorsed on the same. The plaintiff further proved by the defendant that on the 1st July, 1879, he, the defendant, went to the plaintiff's office on Charles street, in Baltimore City, and spoke of the paper given in evidence as a contract, which was exhibited to him, and he referred to the formula thereon, and said it was all right; and then offered to prove that on said occasion the defendant said to the secretary of plaintiff that there was not much money in said contract for the plaintiff, and that the plaintiff had better let him, the defendant, throw up the contract and let him get all his goods from one man, for the purpose of proving that the defendant was unwilling to comply with the said contract, and his refusal to comply with the same, and the causes and reasons of said unwillingness and refusal. The defendant objected to the admissibility of said proof offered, and the Court overruled the objection; whereupon the defendant excepted.

*Fourth Exception.*—The defendant having answered the question as proposed in the last foregoing offer, in the negative, the plaintiff further proved by the defendant, the facts set forth in the opinion of the Court, as to what occurred on the 1st July, 1879.

*Fifth Exception.*—The defendant's attorney on cross-examination of defendant as a witness offered to prove the facts set forth in the Court's statement of this exception.

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The purpose of the offer of this evidence was to show that it was understood by and between said purporting agent and defendant, at the time said contract was entered into, that defendant was to superintend the manufacture of the phosphate in the contract mentioned, for the express purpose of the defendant's seeing and knowing that said phosphate was manufactured in the same manner in which defendant manufactured the same at Taneytown; and that the purpose stated was the sole and only reason for the insertion in the contract of the provision relating to superintendence by defendant, and that the words relating thereto, contained in said contract, were used therein for the purpose and with intent, of both said purporting agent and defendant, of embodying and expressing said purpose; and that when said contract was made, it was understood by and between said person who signed the same as agent and defendant, that the words therein, touching superintendence of defendant, were so inserted and used with intent to secure to defendant assurance that said phosphate would be made in same manner as defendant had manufactured phosphate at Taneytown.

*Sixth Exception.*—The evidence admitted by the Court below under this exception is stated in this Court's opinion in connection with that contained in the third exception, the plaintiff having offered to prove by Mr. Bernard Baker, secretary of the plaintiff, what defendant said in witness' presence on the 1st July, 1879.

*Seventh Exception.*—The letter admitted in evidence under this exception and the answer to it, are set forth in the opinion.

*Eighth Exception.*—The question objected to by the plaintiff in this exception, is stated in the opinion.

*Ninth Exception.*—This is sufficiently stated in the opinion.

*Tenth Exception.*—The defendant then offered to prove by — Linton, that in September, 1879, he applied to the



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plaintiff to buy a quantity of South Carolina bone, and was told by plaintiff, that plaintiff had none on hand; but the plaintiff objected to the admissibility of said proof, and the Court sustained the objection and refused to permit said proof to be given; whereupon the defendant excepted.

*Eleventh Exception.*—After foregoing bills of exception had been taken, signed and sealed, the defendant offered further evidence, and the testimony was closed on both sides. Thereupon the plaintiff offered two prayers, and the defendant offered thirteen prayers, the substance of these prayers appears in the Court's opinion.

The Court granted the plaintiff's prayers and rejected those of the defendant. The defendant excepted. And the verdict and judgment for \$1000 damages, and \$14.53 costs, being for the plaintiff, the defendant appealed.

The cause was argued before BARTOL, C. J., BOWIE, MILLER, ALVEY and IRVING, J.

*William P. Maulsby*, for the appellant.

*Charles B. Roberts*, for the appellee.

MILLER, J., delivered the opinion of the Court.

In this case an action was brought by the appellee, a corporation incorporated under the General Incorporation Law of the State, to recover damages from the appellant in consequence of his failure and refusal to comply with the terms of the following contract:

“Taneytown, Md., May 15th, 1879.

“We have this day contracted with Mr. T. H. Eckenrode of this place for the manufacture of two hundred tons of phosphate by his formula and to be branded with his brand. The goods to be manufactured between July 15th

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and July 30th, 1879. T. H. Eckenrode is to superintend the making of it. These goods are sold to him on the following terms, viz: He is to give his notes, one payable the first day of October, 1879, with interest; the other payable first day of January, 1880, and to bear interest from the first day of October, 1879. The goods are to cost twenty-five dollars per ton. He has the privilege of increasing above order one hundred tons more if done before the 30th of July.

“Chemical Co. of Canton,

“Per W. C. Matheson, Agt.

“I accept the goods on above terms and conditions.

“T. H. Eckenrode.”

This contract though evidently the work of an unskilful hand, is yet so plain as not to leave its construction in any manner of doubt. It imposes upon the company the obligation and duty to manufacture the specified tons of phosphate between the named days, according to Eckenrode's formula, and under his superintendence, to brand them with his brand, and to deliver, or tender delivery of them to him when so manufactured. Upon Eckenrode it imposes the obligation and duty to furnish his formula, to attend or proffer himself ready to attend and supervise the work of manufacture between the days specified, to receive the two hundred tons when so made, and to pay for them the price of twenty-five dollars per ton, by giving his notes therefor payable at the specified dates, with interest from the times stated.

The suit was brought on the 9th of August, 1879, and the declaration after setting out the contract, avers that the plaintiff was ready and willing and prepared in all respects to manufacture the two hundred tons of phosphate according to the agreement, and also the additional one hundred tons, at and between the time and times, and according to the terms and conditions of the agreement,

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and had furnished and provided for the manufacture thereof the requisite materials and appliances according to the formula furnished by the defendant, and in pursuance of the terms of the agreement. It then assigns and avers as a breach "that on or about the *fifth day of July*, in the year 1879, the defendant countermanded the order for said phosphate, and notified the said plaintiff that he would not accept and purchase said phosphate if made by the said plaintiff, and refused utterly to fulfil and perform his undertakings, agreements and contracts as aforesaid under said agreement." The question first and mainly argued in the case is, whether this countermanding of the order by the defendant and his refusal to accept and purchase the phosphate if manufactured, made and announced to the plaintiff *before* the time of performance as stipulated by the contract had arrived, constitutes a good ground of action; and as to this we entertain no doubt.

In the case of *Coit vs. Ambergate, &c., Railway Co.*, 17 *Adol. & Ellis, N. S.*, 117, it was decided by the Court of Queen's Bench that where there is an executory contract for the manufacturing and supply of goods from time to time, to be paid for after delivery, if the purchaser having paid for and accepted a portion of the goods contracted for, gives *notice* to the vendor not to manufacture any more, as he has no occasion for them, and *will not accept* or pay for them, the vendor having been desirous and able to complete the contract, he may, *without manufacturing and tendering the rest of the goods*, maintain an action against the purchaser for a breach of the contract; and that he is entitled to a verdict on pleas traversing allegations that he was ready and willing to perform the contract, that the defendant refused to accept the residue of the goods, and that he prevented and discharged the plaintiff from manufacturing and delivering them. Such *notice* by the defendant the Court held was a legal prevention, though there was no other act of obstruction.

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That case and the doctrine it announces were approved by this Court in *Black vs. Woodrow & Richardson*, 39 Md., 194. Since then later decisions have carried the doctrine still further, and we think it may now be regarded as settled law, both in England and in this country, that where there is a contract like the present for the manufacture and delivery of goods at a definite future period, and before the time of performance arrives the purchaser repudiates the contract and declares he will not be bound by it, or accept the goods if manufactured, and notifies the vendor to that effect, such refusal and notice is a breach of the contract which excuses the vendor from manufacturing the goods, and furnishes him a good cause of action provided he shows himself to have been ready, willing, and able to perform on his part; and for such breach he may sue, if not at once, certainly, as the plaintiff did here, as soon as the period of performance fixed by the contract has elapsed.

The question next presented is: Was there any evidence in the cause legally sufficient to authorize the jury to find such refusal and notice by the defendant? In our opinion there is in the record an abundance of such evidence. The defendant himself testifies to the effect that on the 1st of July, 1879, he was in Baltimore, and went with the company's secretary to their manufactory, where a dispute arose as to how the phosphate should be made, he insisting that what is termed the dry process should be followed, and they that the wet process was as good, and it was finally proposed and agreed that a ton should be made by the latter process so that he could examine it as a sample; that on the afternoon of the same day he went to the company's office, where Mr. Baker their president was also present, and the sample was shown to him, and he said he would not have an article of that kind, and would not accept such an article if it was made by the plaintiff, "and that he countermanded his order for making said

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*phosphate by plaintiff*; the president replied that it took two to make a contract and two to rescind it, that he would not agree to defendant's said countermanding his order to make said phosphate, and would hold him to said contract, and that if defendant would not agree to plaintiff's making said phosphate plaintiff's way, *plaintiff would make it defendant's way or any way he wanted it*; that defendant replied *he had countermanded his order and would have no more to do with it.*" Substantially the same account of what took place at this interview is given by the president and secretary, the latter testifying, that the defendant, after the president had said to him that the phosphate *should be made any way he wanted it*, replied, "*I won't have anything to do with it.*" It also further appears that on the 25th of July, the secretary wrote a letter to the defendant, in which he says, "you still have five days time in which to complete your contract with us. We are prepared to fill our part of the contract as called for. What do you propose to do about it? We now notify you that we have the goods as called for on hand, and have had them since July 1st, 1879. Please let us know what action you propose to take and we will proceed at once on our course of action." To this the defendant replied by a letter on the 28th of July, in which he says, "I answered your question when I was there to manufacture the phosphate; I told you that the kind of phosphate you proposed to make for me I rejected, would not have it, and *that I countermanded the whole order; I still say the same.*" From this and other testimony in the record which need not be stated, it was clearly competent for the jury to find all the hypotheses of fact in the plaintiff's first prayer, and these facts amounted, as we have said, to a breach of the contract by the defendant, and gave the plaintiff the right to maintain this action.

The plaintiff's first prayer also states the measure of damages to be "the difference between the actual cost to

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the plaintiff per ton of said phosphate manufactured according to the formula of the defendant, and by the dry process spoken of by the witnesses, and branded with the defendant's brand, and the price per ton of said phosphate specified in said contract." This rule of damages when applied to a contract like the present, seems to be not only right in principle but amply sustained by authority. It is substantially the same as that adopted in the analogous case of *Masterson vs. Mayor, &c., of Brooklyn*, 7 Hill, 61, a case that was approved by this Court in *Dugan vs. Henderson*, 36 Md., 567. There is proof in the record from which the jury could rightfully have found that damages, measured by this standard, had been sustained by the plaintiff, and there is none that the contract had ever been mutually or validly rescinded.

What we have thus said covers and sustains the rulings of the Court below, in granting the plaintiff's two prayers, and in rejecting all those of the defendant except the thirteenth which will be noticed hereafter. This brings us to the exceptions taken by the defendant to the rulings upon questions of evidence. These are ten in number, but as to many of them very little was said in argument. They are, however, in the record, and it is our duty to dispose of them. In doing so, we shall say but very little as to those, in which we regard the rulings as clearly correct. The evidence offered by the plaintiff and admitted by the Court in the *third* and *sixth* exceptions, as to what the defendant said to the plaintiff's secretary on the morning of the 1st July, when he first went to the company's office, seems to us to be clearly admissible, as tending to show that the defendant was then unwilling to comply with his engagements to the plaintiff, and to explain the reason of that unwillingness, and his subsequent countermanding of the order and repudiation of the contract. It was also clearly competent for the plaintiff to prove, as the Court allowed to be done in the *fourth*

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exception, that after the 1st of July, the defendant never went to Baltimore or to the plaintiff's office or manufactory, to superintend the making of the phosphate. In the *fifth* exception, evidence was offered by the defendant and rejected by the Court to show what was the understanding between Matheson, the plaintiff's agent, and the defendant at the time the contract was made, in reference to defendant's superintending the manufacture of the phosphate, and for what purpose and with what intent the clause referring to such superintendence was inserted in the contract. There was no error in rejecting this testimony. The contract must speak for itself, and besides, if the purpose was in fact such as the offer states, it would have no bearing upon or relevancy to the issues in this action, or to any question it was the province of the jury to determine. Equally clear is the ruling in the *seventh* exception admitting in evidence the letter of the 25th of July, already referred to, written by the plaintiff's secretary to the defendant. It was produced by the defendant upon notice, and we can see no possible objection to its admissibility. The same thing may be said of the ruling in the *tenth* exception. The testimony offered by the defendant in that exception, and rejected by the Court was wholly irrelevant and clearly inadmissible.

In the *eighth* exception the defendant's counsel, on cross-examination of a witness for the plaintiff, asked him, "what was the lowest price at which plaintiff sold any ton of phosphate manufactured by plaintiff during the month of July, 1879;" and the Court, upon objection made, refused to permit this question to be asked or answered. We cannot perceive the relevancy to the issue in this case of any answer the witness could have made to this question. The company were entitled to the benefit of their contract with the defendant whether more or less could be made out of it, provided they were ready and willing to perform it, and it was wholly immaterial

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whether they filled other contracts and made other sales during the same time at a greater or less profit. The evidence shows they were largely engaged in the manufacture and sale of fertilizers, were doing an extensive business, were seeking and filling all orders they could obtain, were constantly buying in large quantities the materials described in the defendant's formula, and that they were at all times able, ready, and willing to manufacture the number of tons specified in this contract and according to its terms. As to these facts there is no conflict of testimony. If then they could comply with this contract, and at the same time fill other orders and make other sales, what matters it to the defendant whether they sold every ton they made for more or less than he agreed to give them, or at what price such sales were made? It was his obligation to abide by his contract, and he is now sued for his refusal to do so. The measure of damages is the difference between the cost of manufacturing the article according to the contract, and the price he agreed by that contract to give for it, and surely it can furnish no excuse to him, no defence to the action, and no mitigation of the damages, that the company sold to other parties every ton they made in this month for more or less than his contract price. We are therefore of opinion there was no error in this ruling.

In the *ninth* exception the defendant offered to prove a number of facts by the witness Rittler, and there was a general objection to the whole offer which the Court sustained. Undoubtedly the rule of practice in this State is well settled, that where an offer is made generally of a mass of testimony complex in its character, and the whole of it is objected to, it is error to exclude the whole, if any part of it is admissible. *Carroll's Lessee vs. Granite Manufacturing Company*, 11 Md., 399; *Curtis vs. Moore*, 20 Md., 93. But to justify the application of this rule it must appear that some part of the rejected testimony was



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clearly admissible. There can be no doubt as to the irrelevancy of almost every item of the present offer. For instance, the facts that it is important to dealers in phosphates to maintain the good character of their brand, that a phosphate manufactured by the dry process is better, and costs more to manufacture it, than one made by the wet process, that it is important the bones should be thoroughly dissolved, that sulphuric acid is the dissolving agent, that some bones absorb more acid in the process of dissolving than others, and that some are liable to be imperfectly dissolved when mingled with others, are all matters entirely foreign to any issue, or any question legitimately arising in this case. To that clause of the offer, however, which refers to the *greater cost* of manufacturing by the dry, than by the wet process, are added the words "*and the amount of difference of said cost,*" and it is argued that it was competent for the defendant to prove the amount of this difference of cost, and that such evidence has a direct bearing on the question of damages. But the measure of damages as laid down in the plaintiff's first prayer, which we have said is correct, is the difference between the cost of manufacturing by the *dry process* and the *contract price*. It was therefore irrelevant to prove the difference in cost *between the two processes* of manufacture, or the amount of that difference, because that would furnish no *data* to the jury in ascertaining the damages, under the rule by which they were to be guided in this matter. Nor was there any proof of the amount of this difference offered by the plaintiff to which such proof could be a reply even if that would make it admissible. We think therefore that this part of the offered testimony was inadmissible, and that the ruling in this exception is correct.

The *first* and *second* exceptions present the same question. The plaintiff offered in evidence the contract sued on, having first proved the signatures of the defendant

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and of Matheson thereto, and that Matheson was verbally appointed agent by the secretary, and that his appointment was verbally approved by the president of the company. The Court then admitted the contract in evidence and to this ruling the defendant excepted. Among the powers granted to corporations by the General Corporation Law of 1868, ch. 471, under which this company was incorporated, is that of appointing a president from among the directors and such officers and agents as the business of the corporation shall require, and it has been argued that an agent authorized to make a contract like this must be appointed either by the body of the corporators or by resolution or vote of the directors. As a general rule this is true, but it does not follow that a valid contract binding upon the corporation may not be made by an agent not so appointed. The doctrine is now well settled, "that not only the *appointment* but the authority of the agent of a corporation may be implied from the adoption or recognition of his acts by the corporation or its directors." *Angell & Ames on Corp.*, sec. 284. In the further progress of the case, after these exceptions had been taken, it was shown by abundant proof, not only that the act of Matheson in making this contract and the contract itself were so recognized and adopted by the company, but the defendant himself acknowledged and recognized it as a contract with the company, treated the company as the contracting party, and acted under the contract by furnishing the formula to which it refers. Had these facts been first proved, or had the offer of the contract been accompanied with an offer to prove them, the rulings in these exceptions would have been entirely correct. From what was thus afterwards proved it is obvious that it was an error to make them upon the state of case then existing, it was an error from which the defendant suffered no injury; and such an error affords no ground for reversal. This disposes

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not only of these exceptions, but of the defendant's thirteenth prayer, which asserts that there was no sufficient evidence that Matheson was the duly constituted agent of the company at the date of the contract and therefore the plaintiff cannot recover. It is to be noted also that the plaintiff's first prayer leaves it to the jury to find that Matheson *was the agent* of the plaintiff, and it may be that the question of agency *vel non* was one of law and not of fact, but as no exception appears by the record to have been taken to the prayer on this ground, in the Court below, this Court cannot consider it defective for that reason. *Rule 4, respecting Appeals*, in 29 *Md.*, 2. Having thus disposed of all the questions presented by the record, and finding no ground of reversal, it follows the judgment must be affirmed.

*Judgment affirmed.*

(Decided 9th December, 1880.)

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GEORGE H. BERRY vs. JOHN DERWART and ELIZABETH  
DERWART, his Wife.

*Evidence in an action of Ejectment—Application to the Court to be allowed to supply Additional Proof, within its Discretion under its Rules.*

In the chain of title produced by the plaintiff in an action of ejectment for the recovery of a lot of ground on Lee Street in the City of Baltimore, there was a deed from K. to A. and D., trustees, dated the 29th November, 1841; which deed contained no description of the lot sued for in the body or granting part of it, but referred to a schedule annexed, for specification and description of the property conveyed. The description in the schedule, which

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was supposed to embrace the lot sued for, was as follows: Five building lots on Lee near Cove Street, 102 feet, @ \$1.25 per foot. It also appeared from this deed that the property embraced by the description just recited, had been conveyed subject to a mortgage from K. to the F. and P. Bank. In the margin of the schedule annexed to the deed of trust, there was a reference to this mortgage as containing a full description of certain property, including the five building lots. The deed of trust to A. and D. contained a power of sale, and it was under and through these trustees by virtue of this power, that the plaintiff claimed title to the lot sued for. Neither the mortgage nor any release thereof was offered in evidence. On exceptions by the defendants, it was **Held**:

1st. That the deed from K. to A. and D., trustees, contained no sufficient description of the property to pass the title thereto; and that if the plaintiff had intended to rely upon the description of the property contained in the mortgage, in aid and support of the deed, the mortgage should have been offered in evidence with the deed.

2nd. That there was no sufficient evidence to show legal title to the property in the plaintiff, as even if the deed from K. had been admitted, and had contained a sufficient description of the property, a release or an assignment of the mortgage should have been given in evidence, or evidence given of the payment or extinguishment of the mortgage debt.

A statement appended to the record transmitted to this Court at the instance of the plaintiff's attorney, in respect to an application to be allowed to supply additional proof in the Court below before the conclusion of the trial, but after the evidence had been closed and prayers submitted, if not finally acted on by the Court below, formed no part of the record and was not before this Court for consideration; and even if the matter had been embraced in a bill of exception, the Court's action could not be reviewed, it being within the Court's discretion under rules of Court.

**APPEAL** from the Circuit Court for Baltimore County.

This case originated in the Baltimore City Court, and was removed on affidavit of the plaintiff to the Circuit Court for Howard County; whence, on affidavit of the defendants, it was removed to the Circuit Court for Baltimore County.

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The description of the lot as contained in the declaration in ejectment referred to in the opinion of the Court is as follows:

Beginning for the same on the line of the southeastern side of Lee street, in the City of Baltimore, at the distance of 340 feet, 7 inches, southwesterly from the corner formed by the intersection of the southwestern side of Warner street and the southeastern side of Lee street, and running thence southeastwardly, at right angles, to Lee street, 100 feet, 8 inches, more or less, to an alley 20 feet wide, known as Little Montgomery Street; thence southwestwardly, and binding on the northwesternmost side of said alley 20 feet, 1 inch, to the lot belonging to William H. Keener; thence northwesterly, binding on said lot of said Keener, and at right angles again to Lee street, 100 feet, 8 inches, more or less; and thence easterly or northeasterly, 20 feet 1 inch, to the beginning.

The case is further stated in the opinion of the Court.

*Exceptions.*—At the trial the defendants offered seven prayers; of which it is necessary to set forth only the fifth and seventh:

5. The defendants move the Court to exclude the copy of a certain deed offered in evidence by the plaintiff, and allowed to come in subject to exception, from David Keener to Armstrong and Dulin, trustees, dated the 29th of November, 1841. 1st, Because the same contains no sufficient description of any property on Lee street, to pass title thereto; [2nd, because the plaintiff has failed to locate any land purported to be conveyed by said deed.]

7. That there is not sufficient evidence in this case to prove title in the plaintiff, and therefore the plaintiff cannot recover under the pleadings and evidence in this case.

The Court, (*Grason and Yellott, J.*), on the 17th December, 1879, rejected the first, second, third, fourth and

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sixth prayers, and granted the fifth as modified and limited by the Court, (such part rejected by the Court being included in brackets,) and also the seventh prayer. The plaintiff excepted.

December 18, 1879.—Motion to introduce new evidence; motion overruled. (Docket entry.)

Same day verdict for defendant, and judgment on verdict for defendant for costs. The plaintiff appealed.

In explanation of the docket entry—"December 18th, 1879, motion to introduce new evidence; motion overruled" all the following appears in the record as sent to the Court of Appeals by request of plaintiff's counsel, and is the statement and rules of Court mentioned in the Court's opinion:

And on the 18th December, 1879, before the jury had been instructed, as stated in the 30th Rule of the Circuit Court for Baltimore County, on the law side thereof, and provided in the 31st of said Rules, the plaintiff, by his counsel, made application to said Court to permit the additional documentary evidence to be given of the description of the lots embraced in the deed of David Keener to Armstrong & Dulin, trustees, recorded among the Land Records of Baltimore City, Lib. T. K., No. 314, fo. 346, &c., which lots are therein mentioned as "five building lots on Lee, near Cove street, 102 feet, at \$1.25 per foot, \$2,100;" and on the margin of said deed, as applicable to said lots—among other property, the words "described fully in a mortgage made to the Farmers' and Planters' Bank in the month of May, 1841," mentioned in the foregoing deed, viz., that from Keener to said trustees—is a mortgage from David Keener to the Farmers' and Planters' Bank of Baltimore, dated the 28th May, 1841; which deed was offered in connection with the deed of release of said mortgage dated 30th November, 1844, recorded among said City Records, Lib. T. K., No. 347, fo. 202, &c.

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And said proposal and application for said Court's permission urged in reference to the liberal provisions.

And the rules of Court, in reference to this matter, are as follows:

29. The Court will ordinarily require that all evidence intended to be produced by plaintiff or defendant, shall be offered before any prayer is made to the Court for its instructions thereon. But in special cases, after the plaintiff's case shall have been closed, the Court, in its discretion, will permit the defendant to submit a prayer or prayers involving the right of the plaintiff to recover, and the extent of such right; but if a prayer so offered is overruled, the defendant shall have a right to go on with his case. The Court, in its discretion, may allow a party to offer evidence discovered after closing his case, or which he could not obtain before.

30. After all testimony intended to be produced by plaintiff and defendant shall have been introduced, the Court will expect to be furnished with all the prayers which the parties respectively propose to found thereon. These prayers shall be argued in connection together, unless otherwise directed by the Court, the plaintiff, if he shall have submitted any material proposition not admitted by the defendant, being entitled to open and conclude on the whole. And the Court upon the whole case, will give such instructions as may appear requisite to place the cause fully before the jury.

31. After the jury shall have been so charged or instructed, as contemplated by the preceding rule, no additional prayer will be received, nor additional evidence be given to the jury, unless by permission of the Court.

The cause was submitted by the appellant to, and argued by the appellees before BARTOL, C. J., BOWIE, MILLER, ALVEY and IRVING, J.

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*William Jessop Ward*, for the appellant.

*William Burns Trundle*, for the appellees.

ALVEY, J., delivered the opinion of Court.

This case was taken from the jury by the instruction given by the Court below, and, as the case was presented on the part of the plaintiff, we do not see that the Court could have done otherwise.

The action was ejectment for the recovery of a lot of ground in the City of Baltimore, on Lee Street. To maintain the action, it was necessary that the plaintiff should have shown that he had, both at the time of the institution of the suit and at the time of trial, the *legal* title and *right* to possession of the premises sued for. *Carroll vs. Norwood*, 5 H. & J., 155. Without showing this character of right in the premises, there could be no recovery by the plaintiff.

In the chain of title produced by the plaintiff there was a deed from Keener to Armstrong and Dulin, trustees, dated 29th of November, 1841. This deed contains no description of the lot sued for in the body or granting part of it, but refers to a schedule annexed for specification and description of the property conveyed; and the description in the schedule, which is supposed to embrace the lot sued for, is given thus: "Five building lots on Lee, near Cove street, 102 feet, @ 1.25 per foot." It also appears from this deed, that the property embraced by the description just recited, was conveyed subject to a mortgage from Keener, the grantor, to The Farmers' and Planters' Bank of Baltimore. The deed of trust to Armstrong and Dulin contained a power of sale, and it is under and through these trustees, by virtue of the power of sale, that the plaintiff claims title to the lot sued for. Neither the mortgage, nor any release thereof, was offered in evidence, so far as it appears from the bills of exception taken at



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the trial; and the admission in evidence of the deed of trust made by Keener being subject to exception by the defendants, the exception was taken by way of prayer for the exclusion of the deed from the jury; which prayer the Court granted, upon the ground that the deed contained no sufficient description of the property in suit. The Court also instructed the jury that there was no sufficient evidence before them to prove legal title in the plaintiff, and therefore their verdict should be for the defendants.

Upon these rulings of the Court, two questions arise: First, whether the deed to the trustees contains a sufficient description of the property to pass the title thereto; and, secondly, whether the Court was right in giving the instruction that there was no sufficient evidence to show legal title to the property in the plaintiff.

1. It is perfectly well settled, both upon reason and authority, that every deed of conveyance, in order to transfer title, must either in terms, or by reference, or other designation, give such description of the subject-matter intended to be conveyed, as will be sufficient to identify the same with reasonable certainty. Here, the deed not professing to convey all the property of the grantor, or even all of his lots or real estate on Lee street, there is really no description or designation of the five building lots on the one side or the other of Lee street; and therefore it would be impossible to locate the lot claimed by the plaintiff, under the description contained in the deed. It is not a question of the sufficiency of the description of the property in the declaration, as seems to be supposed by the appellant, but of the sufficiency of the description in a muniment of title. There is in the margin of the schedule annexed to the deed of trust a reference to the mortgage to the Farmers' and Planters' Bank, as containing a full description of certain property, including the five building lots on Lee

street; and if the plaintiff had intended to rely upon that description in aid and support of the deed, the mortgage ought to have been offered in evidence with the deed; for the deed alone, unaided by any referential description, is not legal evidence to show title to the lot sued for, and is entirely without legal effect for that purpose. *Hammond vs. Norris*, 2 H. & J., 130, 146.

2. But the Court was not only justified in granting the prayer excluding the deed, but also in granting the instruction that there was no sufficient evidence offered by the plaintiff to prove legal title in himself, and therefore he was not entitled to recover. The plaintiff relied alone upon his paper title, and in order to make that title good, it was necessary to show a transfer of title from Keener; and as the deed offered in evidence was insufficient for that purpose, unaided by the production of the mortgage, and was therefore excluded, there was a failure of evidence to show legal title in the plaintiff. But even if the deed had been admitted, and had contained a sufficient description of the property, that instrument showing as it does on its face that it had been made subject to an outstanding mortgage of the five building lots, there would only have been an equity of redemption upon which the deed could have operated; and unless a release or an assignment of the mortgage had been given in evidence, or evidence had been given of the payment or extinguishment of the mortgage debt, the plaintiff would have failed to show legal title in himself to the property sued for. It is true, as a general principle, that a Court of law will not permit an outstanding *satisfied* mortgage to be set up against the mortgagor, or those claiming under him; but, in order to get rid of the effect of such outstanding title, it would be incumbent upon the plaintiff to show that the mortgage debt had been satisfied or in some way extinguished. *Paxon's Lessee vs. Paul*, 3 H. & McH., 399; *Beall vs. Harwood*, 2 H. & J., 167, 173; *Peltz vs. Clarke*,

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5 *Pet.*, 480, 483. No such proof was offered in this case.

The statement appended to the record, and which, as it appears, has been transmitted to this Court at the instance of the plaintiff's attorney, in respect to an application that had been made to be allowed to supply additional proof in the Court below, before the conclusion of the trial, but after the evidence had been closed, and the prayers submitted, if not finally acted on by the Court, forms no part of the record, and is not before us for consideration. Indeed, if the matter had been embraced in a bill of exception, the action of the Court in overruling the plaintiff's motion would not have been a subject of review by this Court;—the matter being entirely within the discretion of the Court, under the rules of Court set out with the statement. *Telegraph Co. vs. Guildersleve*, 29 *Md.*, 234; *Sparrow vs. Grove*, 31 *Md.*, 214.

The judgment of the Court below must be affirmed, with costs.

*Judgment affirmed.*

(Decided 9th December, 1880.)

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HENRY B. SHAFFER and SAMUEL A. MUNN, trading as  
SHAFFER & MUNN vs. UNION MINING COMPANY OF  
ALLEGANY COUNTY.

*Construction of the Act of 1880, ch. 273.*

The Act of 1880, ch. 273, entitled an Act to prohibit the payment of employés of certain corporations operating in Allegany County, otherwise than in legal tender money of the United States, though

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a valid exercise of power by the Legislature, so far as it affects the corporations therein designated, does not conflict with Art. 9 of the Code, relating to the Assignment of Choses in Action. This Act was not intended to restrict, nor does it restrict the powers of the employes of a corporation engaged in mining and manufacturing in Allegany County and employing more than ten hands, so as to prevent their assigning what was due them from the corporation by orders drawn on the corporation in favor of merchants who had sold them goods, said orders specifying that the amounts due the merchants should be deducted from moneys due the employes by the corporation for wages, and be paid to the merchants for their account, and authorizing the merchants to receipt in the employes' names for the amounts so paid, and which orders were accepted by the corporation.

This Act being a penal Statute, and intended to be in the interest of the employé, it is not restrictive of the employé's rights, except in so far as it prevents him or the holder of his assignment of wages from colluding with the employer to do what the law has forbidden any corporation as is therein described from doing.

APPEAL from the Circuit Court for Allegany County.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., BOWIE, MILLER, ALVEY and IRVING, J.

*Johns McCleave*, for the appellants.

*Ferdinand Williams*, for the appellee.

IRVING, J., delivered the opinion of the Court.

This case comes before us on an agreed statement of facts and a waiver of all errors in pleading. The sole object of the suit, it is said, is to obtain a construction of ch. 273 of the Acts of 1880, and test its constitutionality.

The first section of the Act provides, "that every corporation engaged in mining or manufacturing, or operat-

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ing a railroad in Allegany County and employing ten hands or more, shall pay its employés the full amount of their wages in legal tender money of the United States; and that any contract by or on behalf of any such corporation for the payment of the whole or of any part of such wages in any other manner than herein provided, shall be and is hereby declared illegal, null and void; and that every such employé shall be entitled to receive from any such corporation employing him, the whole, or so much of the wages earned by him, as shall not have been actually paid to him in legal tender money of the United States, without set-off or deduction of his demand in respect of any account or claim whatever."

The second section creates an exception from the provisions of the first section, and declares that nothing in the first section shall prevent such corporation from demising the whole, or any part of a tenement to its employés, and deducting from the wages the rent thereof, nor for medicine, medical attendance, nor fuel, nor money advanced to procure these several things.

The third section makes payment, by consent of the employé in the notes of any bank current in the State at the time at par, as good as if made in legal tender money.

The fourth section declares the making of any contract, or any payment "hereby declared illegal" shall be an indictable offence in any Court of competent jurisdiction, and pronounces heavy penalties.

The fifth section makes the Act go into effect from the date of its passage. It was approved April 10th, 1880.

The conceded facts are as follows: the appellants are merchants who rent their place of business from the appellees; but the appellants and appellees beyond this relation of landlord and tenant have no business connection, and neither has any interest in the business of the other. The appellees are a corporation engaged in mining and manufacturing in Allegany County, and employ

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more than ten hands. John L. Barrett, being an employé of the appellees on the second day of January, 1878, and for some time previous thereto, and expecting to continue in the employment of the appellees, (which he did until the bringing of this suit,) did on the second day of January, 1878, execute an order on the appellees in favor of the appellants in these words, viz., "Mt. Savage, January 2nd, 1878, I, John L. Barrett, being in the employ of the Union Mining Company, hereby request the said company through its cashier, to deduct from the moneys now due or which may hereafter be due me for wages, the amounts now due, or which may hereafter be due from me to Messrs. Shaffer & Munn, merchants, as per bills rendered and hereafter to be rendered, by said Shaffer & Munn, and to pay over said amounts to said Shaffer & Munn, for my account; and I hereby authorize said Shaffer & Munn to receipt for me and in my name, for the amounts so paid, which receipts shall be final and absolute. This order to remain in full force and effect until countermanded by me in writing, and delivered to the cashier of said company; but such countermand shall not affect wages earned by me before the delivery of such countermand, whether such wages are due and payable or not, and such countermand shall not take effect until the claims of Shaffer & Munn are paid in full." This paper was signed and sealed by John L. Barrett in the presence of a witness.

A like order was made and executed on the twelfth day of April, 1880, by James H. Brown, in favor of the appellants, he being admitted to have been, at the time and before, and continuously until suit brought in the employ of the appellees. Both these orders were accepted by the appellees on the day of their respective dates.

It is further admitted that the appellants between the 12th day of April, 1880, and the 1st day of May, of the same year, sold goods, wares and merchandise to the

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drawer, John L. Barrett, to the amount of \$51.50 on the faith of his order to the appellants on the appellees, and that the appellees when called on for payment, refused payment, because of the provisions of the Act of 1880, chap. 273. It is also admitted that between the first and twelfth day of April, 1880, the appellants sold to James H. Brown, goods and merchandise amounting to \$53.00, when the order was accepted, and that afterwards on the faith of the order, they sold other goods to the amount of \$52.00. It is also admitted that when demand was made by the appellants, there was enough due each of these assigning employés to pay the appellants' demand. There was a third employé, Wm. M. Johnson, who on the 1st of May, 1880, had due him from the appellees for his wages the sum of sixty dollars, which wages by an assignment in writing in the following words, he passed to the appellants, viz., "To the Union Mining Company of Allegany County, for value received, I hereby assign, set over and transfer to Shaffer & Munn, the amount of wages now due me from you to me, being the sum of sixty dollars for wages for thirty days at two dollars per day, and I do hereby authorize and direct you to pay said sum to Shaffer & Munn, at the next regular pay-day of said Union Mining Company of Allegany County, and I do authorize said Shaffer & Munn to receipt to you for me for said sum." This was signed but had no seal attached. Payment of this was also demanded and refused. All these employés are citizens of the United States and of the State of Maryland.

It is also admitted that the charter of the appellees, as a corporation, contains a reservation that it may be repealed or amended by the Legislature at its pleasure.

Suit was instituted by the appellants in their own name to recover the amounts due respectively on these several assignments.

The *narr.* contained a count on each order and assignment, and it was agreed that all defences might be

admitted under the simple plea of *non assumpsit*, which was accordingly interposed.

The main questions for consideration are first, is this Act a valid exercise of power by the Legislature so far as it affects the Union Mining Company. And secondly, if it was constitutional and valid as to the appellees, was it intended to restrict, and does it restrict the powers of the employés of the corporation, so as to prevent their assigning what was due them from the appellees to the appellants; and if it was so intended was it competent for the Legislature to impose such restriction.

1. It being conceded that the Legislature when it incorporated the Union Mining Company, reserved the right to alter or amend its charter at pleasure, there can be no doubt that the Legislature could enact a law prohibiting the corporation from paying its employés otherwise than in money, and that it could forbid the corporation from making contracts with them for payment in anything but money. It was also entirely competent for the Legislature, as one of the means of securing observance of the law, to withdraw from the appellees the right of set-off, (in a suit against them for wages,) for goods sold their employés in contravention of the Act, or for any other claim prohibited by the Act. The acceptance by the corporation of a charter with the reservation of right to alter and amend, made that provision a part of the contract, which, as between the Legislature and it as a private corporation, it must be understood to be. A corporation has no inherent or natural rights like a citizen. It has no rights but those which are expressly conferred upon it, or are necessarily inferrible from the powers actually granted, or such as may be indispensable to the exercise of such as are granted. A private corporation is only a *quasi* individual, the pure creation of the legislative will, with just such powers as are conferred expressly or by necessary implication and none others. Whatever, there-



fore, may have been the mischief intended to be reached and prevented by this law, by restrictions imposed on the corporation, it was competent for the Legislature by this law which operates as an amendment of its charter, to accomplish. *State vs. Northern Central R. R.*, 44 Md., 131.

2. Having determined that the Legislature has the power to control this appellee in respect to its contracts with its employés, and the mode of paying them; the next inquiry is, does this law by necessary implication restrict the powers of the employés over their wages—the fruits of their labor—so that they may not assign their wages, as others may their *choses in action*?

This statute was evidently conceived and enacted for the purpose of correcting some evil which had resulted to the employés of such corporations as are described in the Act, and perchance to the community also, from the mode in which those corporations had been wont to deal with their operatives. The statute was manifestly intended to be in the interest of the employés. We suppose it must have been intended to protect the employé from future exactions, extortion or over-reaching, supposed to have affected them injuriously in the past. Being protective in its character, it cannot have been intended as restrictive of the employé's rights, except in so far as it prevents his colluding with the employer to do what the law forbade the corporation to do. The Legislature is always presumed to have intended a constitutional exercise of power; and laws will be so construed as to make their provisions lawful if possible. *Cooley's Constitutional Limitations*, 221. It cannot be supposed the Legislature intended to impose a restriction upon these employés, which would have been an unconstitutional invasion of their rights. Judge COOLEY on page 492 of his work on *Constitutional Limitations*, says: "If the Legislature should undertake to provide that persons following some specified trade or employ-

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ment should not have the capacity to make contracts, or to receive conveyances, or to build houses as others are allowed to erect, or in any other way to make use of their property as was permissible to others, it can scarcely be doubted, that the act would transcend the due bounds of legislation, even though no express constitutional provision could be pointed out with which it would come in conflict. To forbid to an individual, or a class, the right to the acquisition or enjoyment of property, in such manner as should be permitted to the community at large, would be to deprive them of *liberty*, in particulars of primary importance to their pursuit of happiness." This is so because equality of rights and privileges is the aim of the law. Judge SHARSWOOD in his note to *Blackstone*, vol. 1, page 127, says that "*liberty* is that state in which each individual has the power to pursue his own happiness according to his own views of his interest and the dictates of his conscience, unrestrained except by *equal, just* and impartial laws."

BLACKSTONE lays down as one of the absolute rights of an Englishman, inherent in every citizen, "the free use, enjoyment and disposal of all his acquisitions without any control or diminution, save only by the law of the land." When he speaks of the control which the law may exercise, he means law which operates equally and alike on all. *Sharswood's edition Blackstone*, page 138.

To accord to this law the construction contended for by the appellee, and which was given it by the learned Judge who decided this case below, would be doing unwarranted violence to the rights of the employés over the fruits of their own labor. It would be preventing their use of their wages, which might have been accumulating in the employer's hands, in the purchase of property, real or personal, and taking conveyance therefor. If the employer should be slothful in payment, it would prevent his employé, however straitened for the want of it,

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using his overdue wages by transfer as other people do their *choses in action*. It would have, also, the further effect of preventing other citizens investing their funds in the debts of such corporation, if they should so desire. Such cannot have been its intention, and ought not to be held its legitimate result. The last count in the declaration illustrates this aspect of the question exactly. In that count the appellants ask to recover of the appellees, the wages of Wm. M. Johnson, amounting to sixty dollars, already earned, and admitted to be due him, which had, by written assignment, been transferred to them for value received, and for which, it may be, they had paid dollar for dollar in money by way of accommodation. That such a claim, although only an open account, is a *chose in action*, and the subject of assignment within the meaning of the Act of 1829, now the 9th Article of the Code, has never been doubted since the decision of *Crawford vs. Brooke*, 4 Gill, 222. If that assignment is not good, and these appellants cannot recover on it, the amount it represents, it must be because this Act of 1880, ch. 273, has *quoad* this assignor, and such *chose in action*, and all other assignors and *choses in action* of exactly the same character, repealed the provisions of the Code on the subject of assignments. If it does work such repeal, it does so by necessary implication; for there is no direct assertion thereof in the Act. That such was not the purpose of the Act, and could not be held to be one of its results, even if such provision were constitutional, we think very evident, when it is considered with reference to what it denounces, and what kind of law it is. It is a penal statute, and must be construed strictly. What it denounces as *void* is the contract of the corporation to pay its hands in any other way than in money. What it expressly prohibits, is the making of such contract with the employé in an other way than as the law directs; and the payment in any other way than it by its

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terms allows. The making of such contract, or the payment of wages in any other way than the law directs, is made an indictable offence, which is heavily punishable by fine. It is the corporation which is punished—not the employé. The latter is treated as the party injured by the corporation dealing with him in the inhibited way; and he is allowed to recover his wages without abatement for the dealings of the corporation in violation of the Act; the corporation being denied set-off on suit for the wages, except in specified particulars. The wages due this assignor were due in money. There is no pretence that the appellee had made any contract with him for payment otherwise; nor does it appear he was not paid the amount of the assigned bill in money by the assignees. The only ground on which payment of this claim is resisted is, that in consequence of the provisions of this statute, Johnson has no right to assign his claim to anybody, and the company can lawfully pay nobody but him in person. Such is certainly not a necessary or reasonable implication from the statute. Clearly, this being a penal statute, that will not be an offence under it, which is not expressly within its prohibitions, or necessarily within its spirit. Would the payment of this sum in money to Shaffer and Munn when presented without suit have subjected the appellee to indictment and justified conviction under this statute? Every element or ingredient of the offence denounced by this statute is wanting to justify prosecution. It is too plain for argument, that in that instance there is not the shadow of ground for conviction. No contract in violation of the statute exists. No payment has been made otherwise than in money, nor will be if the judgment goes and is legally enforced; and there is no reason to suspect collusion. We cannot have one rule for construing this statute in its criminal aspect, and another in administering it civilly. The defendants were certainly liable to pay this assignment. The assignee is

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directed to receipt *for the money, the sum* assigned, and that receipt would protect the appellee against the assignor to that extent on a suit by employé for his wages. It would be payment *pro tanto*, not set-off. To this extent at least, there was error in the ruling of the Court below.

Applying the same tests to the other counts in the *narr.* which set out the two orders, can recovery be refused? These orders are for the payment of wages already due, and for wages yet to be earned, and to become due; and they also provide that the payee shall receipt in the name of the drawer, and such receipt shall be good and conclusive against the drawer. The fact that wages to be earned, and not then earned, were included in the order, (if there was no collusion to evade the law,) could not effect the recovery for so much wages as might be due when the order was given, if the unearned wages were not assignable.

The learned Judge who decided this case below, says in his opinion that "the current of authority seems to establish the proposition that such assignments are valid, provided the assignor at the time of the assignment is under a contract of employment, but that if he is not, then the assignment is invalid."

We express no opinion upon that question, because the admission of facts does not meet the requirements of those cases wherein such assignments have been upheld. It does not appear from the evidence that there was such subsisting binding contract for service to be rendered, and payment to be made for it, which binds the employé to render service, and the employer to accept the service and retain in his employ, as has been held, (in those cases affirming such assignability,) to be necessary to support it. In this case, the admission goes no further than to say that these employés had been in the service of the Mining Company for some time previous to the date of order, and at its date expected to continue therein, and

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actually did so continue, until suit brought; but it nowhere appears that the Mining Company was under a contract to employ for more than a day. *Non constat*, but he might be discharged any moment. It remains to inquire whether these orders were fraudulent; that is in evasion or fraud of the law; and were the acceptances by the appellee void because in violation of the law. According to the rule and reasons we have expressed in considering the assignment set out in the third count of the appellants' *narr.* the order and acceptances were not void, and payment of them to the extent that wages had been earned when the orders were given must be enforced, unless the facts would warrant a conviction of the appellee for making such acceptance and payment according to it. If it appeared in the proof that the appellee had contracted with these hands, that they should take up their wages or any part of them in the store of Shaffer & Munn, by purchasing goods of that firm, so that thereby the hands could not get full payment in money, and so that the Mining Company could thereby get the opportunity of settling business with Shaffer & Munn without the payment of "ready money," we should have little difficulty in saying such a contract was within the prohibition of the statute, and that the appellants must be held in complicity with an effort to evade the statute, and aiding therein, and would be denied the right to recover. It does not seem to us, however, that such a state of things does exist. It does not positively appear to be the case, and we cannot reasonably infer any such arrangement. There may be some suspicion of the transaction, that it was gotten up in evasion of the statute, but there is not proof enough to bring it either within its letter or its spirit. The fact that the store-house in which the appellants conduct their business belongs to the appellee, and is rented of it by the appellants, is certainly not enough to prevent their dealing with their landlord's employés,

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selling them necessities or other property, and accepting from them in payment, orders and assignments on their employers, as we have said other people may legitimately do. From the bare relation of landlord and tenant, we may not infer a combination to transgress or evade the law, and that fact standing alone cannot render the acceptances void. The acceptances were contracts to pay to Shaffer & Munn the sums they represented, and their payment by appellee will be *payment* of so much money to the assigning employé, unless the transaction was an intended violation of the statute, and evasion would be held to be so. The proof discloses nothing from which we could find that the hands did not exercise an uninfluenced discretion in dealing with the appellants, nor that the appellee would be setting off as against the employé anything but payments in money. The mention in the orders of bills to be paid by the appellee, was only a mode of stating the amounts to be paid on the order, and for which the appellants were authorized in the name of the assignor to receipt. The bills paid would not be "set-off," but the receipts would be *payment* of so much money as appellants acknowledged to have received, and would be so received in evidence on a suit for the wages by the employé, under a plea of payment, and could not be excluded under the facts of this case, without others in aid of them. Under these facts the appellee could not be convicted, and must be held to his undertaking by the acceptance of the orders. If the employé had sued for his wages, and the appellee had pleaded payment, and to that the plaintiff had replied that by the contract of service he was bound to take up the amount of his wages or any part thereof in the store of these appellants, and to that a demurrer had been interposed, a very different question would be presented, and we might find more difficulty in its decision. Presented, as this question is, we think the Circuit Court erred in deciding that this

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Act of 1880 so far repealed the ninth Article of the Code touching assignments, as prevent the employés of such companies as are described in the statute from assigning their wages, no matter how *bona fide* the assignment might be, and for that reason the judgment will be reversed and a new trial will be ordered.

*Judgment reversed with costs,  
and new trial ordered.*

(Decided 9th December, 1880.)

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JOHN GORE vs. JACOB C. BRUBAKER.

*Injunction to prevent the erection of Obstructions on a strip of ground alleged to be a Public Way—Agreement for the Use of the strip of ground.*

If, by reason of obstructions erected on a strip of ground alleged to be a public way, the applicant for an injunction for their abatement, claiming the use of the strip of ground as one of the public, and negating by the allegations of his bill and his testimony, all mere private right in it, were obstructed or deprived of reasonable access to his buildings on his lot, and thereby subjected to loss and inconvenience, that would be such special and particular injury as would entitle him, (if the allegations were well founded in fact,) to remedy from a Court of Equity. But the applicant for such an injunction and the purchaser of the strip of ground having contracted with each other in respect to its use, and the manner of user, on failure of compliance, the remedy would be on the agreement.

APPEAL from the Circuit Court for Carroll County, in Equity.

On the 30th of August, 1877, the appellant applied to the Court below, for an injunction to restrain the appellee



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from erecting obstructions on a strip of ground, which is described in the opinion of this Court, and that the appellee might be enjoined from interfering with the complainant's ingress and egress over this strip of ground to and from his property. On the filing of the bill and exhibits the injunction was granted. Afterwards on answer being filed and testimony taken, the cause was submitted without argument for final hearing, and on the 5th February, 1880, the injunction was dissolved and the bill dismissed. From this decree of the Court below, (MILLER, HAYDEN and HAMMOND, J.,) the complainant appealed. The testimony taken in the cause is epitomized in the opinion. By the contract duly executed by the parties alluded to in the opinion, the appellee, Brubaker, proposed on the 21st of July, 1877, for a nominal consideration, to grant and convey to John Gore, the appellant, "the right of way or roadway across the controverted land, which roadway Gore must pave on a level with the grade of the foot or side-walk with flat stone, which said grade shall neither be increased or diminished more than four inches from its present grade, and to keep his said roadway in good repair, and further to have the right or privilege of moving his carriages in and out of his carriage house across said lot or disputed land. And further, the said Gore shall have the right or privilege of carrying or throwing his wood and coal across said lot, but shall not permit the the same to remain on said lot for a longer time than shall be reasonably necessary to convey the same across said land to its proper place. And further, that said Gore shall covenant that he will not obstruct, or in any manner impair the free use and occupancy of said lot by permitting coal, wood or carriage, or anything else to remain thereon for a longer period than shall be reasonably necessary to remove them for their ordinarily useful purposes; and further, that he will remove from off said lot, litter or objectionable matter, which may have been

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placed there by his use of said lot, or by his agency; and further, that he will make and keep in repair the bridge across the gutter when he may make his crossing, and that said gutter shall not be made nearer than two feet to the line of said Gore's lot." The appellant accepted "the proposition, and agreed to the terms to be embodied in a conveyance, to be thereafter executed by Jacob C. Brubaker and wife to him. The consideration to be five dollars."

The cause was argued before BARTOL, C. J., BOWIE, ALVEY and IRVING, J.

*William P. Maulsby*, for the appellant.

*Charles B. Roberts*, for the appellee.

ALVEY, J., delivered the opinion of the Court.

The application of the plaintiff, in this case, for the injunction, was founded upon the allegation that the strip of ground, six or six and a half feet wide, lying along the whole extent, and contiguous to the east side, of his lot, in the village of Uniontown, had been dedicated to public use, and formed part of the cross alley running from Main Street north to the intersection of an alley running parallel with Main Street. He alleges in his bill that the entire open space between the fences enclosing his lot on the one side, and that of Gilbert on the other, is embraced within the limits of the public alley; and his various out-buildings being upon the east line of his lot, bounded, as he alleges, by this alley, the special ground of his bill is, that he is entitled to ingress and egress, from and to this alley, to and from his various buildings on and near the line of his lot thus bounded; and that, inasmuch as such ingress and egress have been obstructed by erections placed in the alley by the defendant, he is entitled to relief, and to have the defendant restrained.

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If the allegations of the bill were true, and the plaintiff had done nothing to preclude him from invoking the aid of the Court, there could be but little difficulty in affording him relief. For if, by reason of the obstructions complained of, in the public way or alley, the plaintiff had been obstructed or deprived of reasonable access to his buildings on his lot, and thereby subjected to loss and inconvenience, that would be such *special* and *particular* injury to the plaintiff as would entitle him to remedy from a Court of equity. *Roman vs. Strauss*, 10 Md., '89; *Georgetown vs. Canal Co.*, 12 Pet., 98; *Irwin vs. Dixon*, 9 How., 10, 28; *Cook vs. Corporation of Bath*, L. R., 6 Eq. Cas., 177; *Higbee vs. Camden & Amb. R. Co.*, 19 N. J. Ch. 278. But these allegations of the bill are denied by the answer of the defendant; and the proof shows that they are not well founded in fact.

It appears from the testimony of Harbaugh, the only witness who professes to have knowledge of the original location of the ways of the village of Uniontown, that the alley between the lot now owned by the plaintiff and that owned by Gilbert, was, like the other alleys of the village, laid out to be sixteen feet wide; and that the strip of land on the west of this alley, and adjoining the lot not owned by the plaintiff, was not included in the alley, but was left by Cover, the founder of the village, to afford a more ample way for the benefit of his own property, now occupied by the defendant, to and from the main street of the town. This was a long time ago; and if the public had been allowed to use and enjoy this strip of land, in connection with the alley, uninterruptedly and without question, for the thirty or forty years, as alleged by the plaintiff, a public right by prescription or presumptive dedication might well be maintained. But the evidence makes it quite clear that there has been no such continuous and uninterrupted user by the public as would be sufficient to establish such right in

the strip adjoining the plaintiff's lot; and the user and treatment thereof by the plaintiff, and those preceding him in the occupancy of his lot, have been wholly inconsistent with the pretension now made that the public had acquired such right. The public have used the sixteen feet originally designed as the width of the alley; but the adjoining strip of six feet would appear to have been used and treated by the plaintiff, not as part of the public alley, but as vacant ground, proper to be made a place of deposit for lumber, wood, and coal, and even the erection of a coal-house. The defendant has recently acquired title to this strip of ground, and has constructed a board-walk thereon; thus making a good way from his own property to Main Street,—the purpose, as it would appear, for which the strip was originally designed by the founder of the village.

Whether the plaintiff could have maintained a right to this strip of land by adverse user and possession, or whether he could have maintained a right to an easement therein, acquired by long user, for access to his buildings, are questions not presented on this bill. The plaintiff has thought proper to base his right to use the strip of ground upon the alleged right of the public therein; and by the allegations of his bill, and his own testimony, he negatives all mere private right in the strip of ground, as distinguished from his right therein as one of the public. It is solely upon the theory that the strip forms part of the public alley that the plaintiff founds his right to relief; and that foundation, as we have said, is entirely disproved.

But whether the application be made upon the one theory or the other, there is no ground for such relief as that asked by the plaintiff, upon the proof in the case. The plaintiff and defendant have contracted with each other, in respect to the use, and the manner of user, of the strip of ground in controversy; and the defendant

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has proved that he is ready and willing to execute and give full effect to that agreement. If he fails to do so, the remedy of the plaintiff is upon the agreement, and not in the form in which he now seeks it.

Entertaining these views in regard to the case, we must affirm the decree of the Court below, with costs to the appellee.

*Decree affirmed with costs.*

(Decided 9th December, 1880.)

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HENRY STRITE and D. M. WITMER vs. ISRAEL REIFF,  
Trustee.

*Arbitration and Award by Judges of an Orphans' Court—Appeal—Art. 7, sec. 7, of the Code—Jurisdiction.*

The executor of an estate had a fund of which S. was entitled to a share, unless R. claiming under a deed of trust to him from S. or W. claiming by assignment from S. was entitled to it. The claimants of the share by written agreement submitted the matter to the arbitrament and award of the three Judges of an Orphans' Court, whose judgment and determination should be binding, final and conclusive upon the parties, unless appealed from to this Court within thirty days thereafter by any party aggrieved. On an appeal directly from the award, it was HELD:

- 1st. That the Orphans' Court, as such, had no jurisdiction in the premises, and that if the reference were to the Judges as an Orphans' Court, under Art. 7, sec. 7, of the Code, and were warranted by the statute, the decision would be final and no appeal would lie.
- 2nd. That if the reference were to the Judges as individuals, it was an ordinary matter of arbitration and award from which there was no appeal; and that the reservation of the right of appeal in the agreement could confer on this Court no right to hear the case.

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## APPEAL from the Orphans' Court of Washington County.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., MILLER, ALVEY, ROBINSON and IRVING, J., for the appellants, and submitted for the appellee.

*T. H. Edwards*, for the appellants.

The Orphans' Court had no jurisdiction to arbitrate in this case. The only power that Court has to arbitrate is conferred by Code, Article 7, sec. 7, in these words :

"The several Orphans' Courts of this State shall have power, with the consent of both parties, to be entered on their proceedings, to arbitrate between a claimant and an executor or administrator, or between an executor and a person against whom he has a claim, or the dispute may by the parties be referred to any person or persons approved by the Orphans' Court."

This statute does not give the Orphans' Courts jurisdiction to become general arbitrators, and to entertain any and all matters which may be submitted to them by any persons. It confers jurisdiction to arbitrate only "between claimant and an executor," or "between an executor and a person against whom he has a claim." The case at bar does not fall within either of these classes.

The Orphans' Court is of limited jurisdiction ; and can exercise no authority not expressly given by law. *Brodess vs. Thompson*, 2 H. & G., 120 ; *State vs. Warren*, 28 Md., 338.

And where the law does not confer jurisdiction, no act of the parties, nor any assent or submission by them, can give jurisdiction.

*H. H. Keedy*, for the appellee.

It has been suggested that the Orphans' Court had no jurisdiction, and that none could be conferred upon it by

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agreement. It will be observed that the matter in controversy was "submitted to the arbitrament and award of the three Judges of the Orphans' Court." They were to act upon it as arbitrators and not as a Court. If their award is wrong, it is not a subject of appeal to this Court, and this appeal should therefore be dismissed.

IRVING, J., delivered the opinion of the Court.

The appeal in this case must be dismissed. It appears by the record, that the subject-matter of the controversy involved in this appeal, was, by written agreement of parties, submitted to the arbitrament and award of "the three Judges of the Orphans' Court," (of Washington County,) "whose judgment and determination in the premises shall be binding, final and conclusive upon all the parties, unless appealed from within thirty days thereafter by any party aggrieved, and such appeal shall be to the Court of Appeals of Maryland."

Abraham Strite, as executor of another Abraham Strite, held a fund of which Henry Strite, (one of the appellants,) as a child of the deceased Abraham Strite, is entitled to a share, unless Israel Reiff, who claims by a deed of trust to him from Henry Strite, or D. M. Witmer, (who also claims by assignment from Henry Strite,) is entitled to this share. Three persons are claiming of the executor, and it is their respective claims which they have submitted to the arbitration of the Judges of the Orphans' Court. It is apparent, that the Orphans' Court, as such, had no power finally to adjudge between these persons as to their respective rights; and it is so conceded by the appellant. If their award has any binding effect, it is because of the agreement making the submission to them. Whether that agreement making the submission was made under, and was warranted by sec. 7, Art. 7, of the Code of Public General Laws; or was a reference by agreement to the Judges, as individuals, irrespective of

that section of the Code makes no difference. If the reference was to the Judges as an Orphans' Court, and was warranted by the statute, the decision would be final, and no appeal would lie. The statute contemplated no appeal from the award itself. It provided for a final settlement of disputes in this way to save litigation, evidently, and therefore provided for no appeal. Consent cannot give jurisdiction; and the reservation of the right of appeal, by the terms of reference, can confer on this Court no right to hear the case. If the reference was outside the provisions of the statute, it stands in the attitude of an ordinary case of arbitration and award, from which there is no appeal. No matter in what form the Judges of the Orphans' Court may have entered their decision in this case, it will be referred to their character as arbitrators, and not to their official character as a Court.

It having been put in the form of a final order, or judgment of that Court, cannot give it the force and effect of an order or judgment which would be within their jurisdiction to enter.

Judge COOLEY, in his work on *Constitutional Limitations*, page 500, says: "If Judges should sit to hear such controversy; they would not sit as a Court; at most they would be but arbitrators; and their action could not be sustained on that theory, unless it appeared that the parties had designed to make the Judges their arbitrators, instead of expecting from them valid judicial action as an organized Court. Even then their judgment would not be binding as a judgment, but only as an award."

This case is materially distinguishable from the case of *Woods vs. Matchett, Adm'x*, 47 Md., 394.

In that case the matter in controversy between the parties was with reference to a claim of the appellee against the appellant. That dispute was, by the consent of parties, referred by the Orphans' Court to a third person.



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Exceptions were filed against the confirmation of the award for errors patent on its face. The Orphans' Court overruled the exceptions and confirmed the award. Appeal was taken from that order of the Court overruling the exceptions and ratifying the award. No point was made, whether the reference, made by the Orphans' Court, was of a subject within the meaning of Art. 7, sec. 7, of the Code; or whether the subject-matter was a controversy within the jurisdiction of the Orphans' Court to decide without the assent of parties; nor was there any point or question made whether the right of appeal existed in such case; so that the Court did not directly pass on any of those questions. We are not therefore trammelled in this case by that decision. In this case, the reference was made by agreement directly to the Judges of the Orphans' Court. They made an award. No exceptions were filed; but appeal was taken directly from the award.

*Appeal dismissed.*

(Decided 10th December, 1880.)

THE RELIEF BUILDING ASSOCIATION OF BALTIMORE  
CITY *vs.* MARY SCHMIDT and JUSTUS SCHMIDT.

*Insolvent Law not applicable to a Married Woman.*

The insolvent law of this State contained in Art. 48 of the Code, and in previous Acts, does not embrace the case of a married woman as an insolvent debtor; nor do the Acts subsequent to the Code, making special provision for enabling married women to contract, and for recoveries against them at law, extend the provisions, or affect the construction of the insolvent law in the Code.

APPEAL from the Circuit Court of Baltimore City.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., ALVEY, ROBINSON and IRVING, J.

*John Carson*, for the appellant.

*J. Upshur Dennis*, for the appellees.

ALVEY, J., delivered the opinion of the Court.

The appeal in this case was taken from an order dismissing the petition of the purchaser, under a decree, praying for the rescission of an order of ratification of the sale. The decree was passed upon the petition of the appellant, the mortgagee, for the sale of the mortgaged premises; and default having occurred, the sale was made and reported by the trustee, the appellant having become the purchaser. The mortgage was made by husband and wife, the property embraced being that of the wife, acquired by her in 1872. After the property had been advertised for sale by the trustee under the decree, the wife, one of the mortgagors, applied for the benefit of

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the insolvent law of the State; the application being made on the 12th of April, 1879, and the sale by the trustee under the decree being made on the 14th of April, 1879. After this, the trustee in insolvency proceeded to sell the same property, and the appellant became the purchaser thereof at that sale also. This latter sale was reported to the insolvent Court, and the appellant excepted thereto, upon the ground that a married woman cannot take the benefit of the insolvent law. That proceeding is still pending undisposed of. Afterwards the sale made under the decree was finally ratified. Subsequently, but during the same term of Court, the appellant, as purchaser, filed a petition asking a rescission of the order of ratification, upon the ground that the sale made by the trustee under the decree, was wholly null and void, by reason of the fact that Mary Schmidt, the *feme covert* mortgagor, had previously applied for the benefit of the insolvent law. This petition was dismissed, and it is from the order of dismissal that the present appeal has been taken.

The sole question for decision is, whether the insolvent law of this State, in force at the time of the application involved, embraced the case of a married woman as an insolvent debtor.

We are not aware that it was ever supposed, until very recently, that the insolvent laws of this State had any application whatever to the case of a married woman, treated as an insolvent debtor. It is quite certain that the insolvent laws that prevailed prior to the Act of 1854, ch. 193, had no such application. The liability to arrest and imprisonment for debt, and the appearance bond of the applicant, contemplated by those laws, to say nothing of many other provisions that a married woman could not, consistently with her legal *status*, be required to conform to, would plainly show that those laws were never intended to apply to the case of a married woman. After

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the adoption of the Constitution of 1851, abolishing imprisonment for debt, and the appearance bond of the applicant was no longer essential, it became necessary that the insolvent system should be revised, and hence the passage of the Act of 1854, ch. 193, which was only an attempt to revise and systematise the previous legislation upon the subject, and making it conform to the new state of things. There is nothing whatever to indicate any purpose on the part of the Legislature to embrace within the provisions of that Act any persons or class of persons not embraced by the pre-existing insolvent laws. That Act, with but slight modification in some of its provisions, was embodied in the Code, as Article 48. The main design of that, as of all previous insolvent laws, was the relief of insolvent debtors, and to discharge them from their contracts and obligations. Hence it was provided, that, if the applicant complied with all the provisions of the statute, and there was no sufficient cause shown against it, the Court should "discharge the insolvent from all debts and contracts made before the filing of his petition, and that he should be released from all such debts and contracts," &c. *Code, Art. 48, sec. 4.* This main provision and leading purpose of the statute could have no application to the case of a married woman, as the law stood at the time of the passage of the Act of 1854, or the adoption of the Code in 1860. As the law stood at that time and previously, a *feme covert* could not, at law, enter into any valid contract to bind either her person or her estate, except to render liable a limited acquisition to process of attachment, under the Act of 1842; and even in equity she could not by contract bind her person, or her property generally; but only her separate property, when the contract was made with special reference thereto. There was no personal obligation incurred by her contract, and while in a Court of law it was regarded as invalid and without legal effect, a

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Court of equity had no power to enforce it against her, *in personam*, but only *in rem* against her separate property charged therewith. 2 *Sto. Eq. Jur.*, secs. 1397, 1398; *Koontz vs. Nabb*, 16 *Md.*, 549; *Griffith vs. Clarke*, 18 *Md.*, 457. There was therefore no reason why the statute should be made to apply to the case of a married woman; for her contracts could only be enforced to the extent of her separate property charged, and when that was disposed of or appropriated, neither she nor any other property that she might own could ever be held liable. And though the Legislature has, since the adoption of the Code, passed various Acts making special provision for enabling married women to contract, and for recoveries against them at law, as by the Acts of 1862, ch. 49; 1867, ch. 223; 1872, ch. 270; 1880, ch. 253, those Acts can in no manner extend the provisions, or affect the construction of the insolvent law, as we find it in the Code.

But there are other reasons why a married woman cannot obtain the benefit of the insolvent law, and which show conclusively that the law was never intended to apply to her.

Section 2 of Article 48 of the Code provides, that the insolvent shall convey to the trustee to be appointed by the Court, all his property and estate of every description, and it is not until this is done that the Court is required, by the succeeding section, to fix a day for the insolvent to appear to answer interrogatories or allegations by the creditors. The making the deed, therefore, to the trustee, is an essential condition in the proceedings; and, if the husband be sane, there is no law enabling a married woman to convey her estate held under the Code, except it be by the joint deed of herself and her husband. This is expressly so provided by section 2 of Article 45 of the Code, as re-enacted by the Act of 1872, ch. 270.

Now, the wife has the right to apply for and obtain the benefit of the insolvent law, or she has not; it must be

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the one thing or the other absolutely. It cannot depend upon the mere will and pleasure of the husband, as would be the case if the husband is required to join in the deed to the trustee. If such qualified right had been contemplated, we should surely have had something in the terms of the statute providing for the case. And without the husband's joinder in the deed, we can hardly suppose it possible that the Legislature could have intended, after placing an express restriction upon the wife, as to her power to convey without the joinder of her husband, that she should have the way open to her of simply applying for the benefit of the insolvent law, as a means of disposing of her property without his consent. If she has the right to apply, whether she be actually insolvent or not, would be wholly immaterial as to the vesting of the property in the trustee. *State, use of Buckley vs. Cutler*, 18 *Md.*, 419. We find nothing in the law to justify the conclusion that she has any such right.

This Court, then, being of opinion, for the reasons stated, that the application for the benefit of the insolvent law by the *feme covert* mortgagor was a mere nullity, and without any legal effect whatever, it follows that such application, and the proceedings thereon, can in no manner affect the title to the mortgaged property sold to the appellant by the trustee under the decree of sale; and therefore the ratification was proper, and the Court below committed no error in refusing the prayer of the appellant to rescind the order of ratification. The order appealed from will be affirmed, with costs to the appellees.

*Order affirmed, and  
cause remanded.*

(Decided 16th December, 1880.)

EDMUND JAMISON, and others *vs.* THE STATE OF MARYLAND, use of HORACE RESLEY.

*Pleading—Construction of Art. 38, sec. 1, and Art. 18, sec. 32, and Art. 57, sec. 12, of the Code.*

To an action on a sheriff's bond for fees placed in his hands for collection by a former clerk of the Circuit Court for Allegany County, the defendants, among other pleas, pleaded that the sheriff was unable to collect the fees sued for by distress, execution or otherwise, on account of the plaintiff's failure to make them out in a fair and clear manner, and in words at length as required by law; and that the said fees did not accrue within three years before the sheriff received the same. To these pleas the plaintiff demurred.

HELD:

- 1st. That the plea first mentioned was not sufficient; and that a plea to this action should have alleged under Art. 38, sec. 1, and Art. 18, sec. 32, of the Code, that the sheriff was unable to collect the fees, because the persons against whom such fees were chargeable required the accounts to be made out in words at length, of which the plaintiff had notice, and that he had failed within a reasonable time to furnish such accounts as required by law.
- 2nd. That the other plea would be good under Art. 57, sec. 12, in a suit against a fee debtor; but that as a plea to this action it was defective, as it should have averred not only that the fees did not accrue within three years, but that the parties against whom they were charged refused to pay the same, because they were barred by the statute.

APPEAL from the Circuit Court for Garrett County.

The case is stated in the opinion of the Court.

The cause was submitted to BARTOL, C. J., BOWIE, GRASON, MILLER, ALVEY, ROBINSON and IRVING, J.

*John W. Veitch*, for the appellants.

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Jamison, *et al.* vs. The State, use of Resley.

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*William J. Read*, for the appellee.

ROBINSON, J., delivered the opinion of the Court.

This is a suit on a sheriff's bond for fees placed in his hands for collection by the appellee, formerly clerk of the Circuit Court for Allegany County.

The questions to be determined arise upon the defendants' eighth and ninth pleas, to both of which the plaintiff demurred.

As a defence to the action, the defendants by their eighth plea, allege that the sheriff was unable to collect the fees mentioned in the declaration, by distress, execution or otherwise, on account of the plaintiff's failure to make them out in a fair and clear manner, and in words at length as required by law.

The law requires that all accounts for officers' fees, shall be made out "in a fair and clear manner, and in words at length," and it further provides that "whenever any person interested in them, or to whom the same shall be charged, shall require a copy of such account, the several officers herein named shall, in as short a time as may be convenient, give him an account of such charges in words at length." *Article 38, sec. 1, Article 18, sec. 32, Md. Code.*

The object of the law was to enable all persons against whom fees were charged by the several officers of the State, to understand precisely the nature and character of such charges, and also to prevent such officers from charging improper and illegal fees.

The several statutes were passed in the interest and for the protection of the *fee debtor*. If such accounts are not made out as prescribed by law, the debtor may object to the payment of the same on that ground, and if such objection be made, the officer must "in as short a time as may be convenient, make out the account in words at length."



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This is a privilege however which the debtor may waive, and he may pay the account although it is not made in the manner prescribed.

Here the action is against the sheriff's bond, on the ground that he did not enforce the payment of the fees placed in his hands by the plaintiff according to law, and the plea should have alleged that the sheriff was unable to collect the same, because the persons against whom such fees were charged, required the accounts to be made out in words at length, of which the plaintiff had notice, and that he failed within a reasonable time to furnish such accounts as required by law. Merely saying he was unable to collect the fees mentioned in the declaration, because they were not made out in words at length is not sufficient, because the law contemplates that upon such objection being made by the debtor, the officer shall have a reasonable time within which to make out his account in the manner prescribed by the statute.

The ninth plea is also defective. It alleges that the said fees "did not accrue within three years before the same were placed in the sheriff's hands for collection."

The Code provides, it is true, that officers' fees shall be collected within three years from their date, and not after. *Article 57, sec. 12.*

If this were a suit against the fee debtor, this would be a good plea.

This statute was also passed for the protection of the fee debtor, and he has the right to rely upon the plea of limitations if he sees proper.

But this is a suit on the bond of a sheriff, and although the fees placed in his hands for collection did not accrue within three years, it by no means follows that he could not, and did not collect the same.

The plea should have averred not only that the fees did not accrue within three years, but that the parties against

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whom they were charged refused to pay the same, because they were barred by the Statute.

For these reasons the judgment below will be affirmed.

*Judgment affirmed.*

(Decided 16th December, 1880.)

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JOSEPH J. ROBINSON & SON and others *vs.* THE CONSOLIDATED REAL ESTATE AND FIRE INSURANCE COMPANY OF BALTIMORE CITY.

*Priority of a Judgment over Mechanics' Liens in the Distribution of an Insolvent's Estate.*

The appellee on the 3rd October, 1874, leased certain lots of ground in Baltimore to J., he contemplating the borrowing of money from the appellee to erect houses on the ground, and in pursuance of an agreement whereby the appellee was to advance from time to time money to him for the erection of the houses, J. did, at the time of accepting the lease, confess a judgment in favor of the appellee for \$4500 on terms, whereby the same was to be held as security for the re-payment of all moneys the appellee might advance to J. (not to exceed the amount of the judgment,) between its date and the 1st January, 1876. At the same time J. mortgaged the ground to the appellee to secure the advances mentioned in the terms of the judgment. After the judgment had been entered up and the mortgage made, J. commenced the houses; and after the commencement of the houses the appellee in pursuance of the terms of the judgment, advanced to J. an amount exceeding \$698. The appellants furnished materials for and about the erection of the houses, also for an amount exceeding \$698, for which they filed liens against the property. On the distribution in insolvency of \$698, proceeds from the sale by the trustee of J., an insolvent debtor, of the property leased to him by the appellee, it was HELD:

That the judgment to the appellee had priority over the mechanics' liens filed by the appellants.

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APPEAL from the Court of Common Pleas.

The case is stated in the opinion of the Court.

The cause was argued by agreement of counsel before BARTOL, C. J., ROBINSON and IRVING, J., and the decision was participated in by ALVEY, J.

*James Pollard* and *James H. Gable*, for the appellants.

*Luther M. Reynolds*, for the appellee.

IRVING, J., delivered the opinion of the Court.

This case presents a single question for our decision. It is a controversy between lien holders in the distribution of an insolvent's estate. The Judge of the Court of Common Pleas, whence the appeal comes, certifies, that "the only question raised and decided by him sitting as a Court of insolvency, was whether the judgment, the docket entries whereof were filed in the cause by the Consolidated Real Estate and Fire Insurance Company, or the mechanics' liens, filed by the several claimants, were entitled to priority upon the agreed statement of facts filed therein, in the distribution of the fund in the hands of the trustee in insolvency, amounting to the sum of \$693.00." The judgment was, by the decision of that Court, awarded priority and the audit so allowing was ratified; and the only question before us is, was that determination right as a question of law.

The judgment, so awarded priority, was rendered by confession in the Baltimore City Court on the 3rd day of October, 1874, for \$4500, with interest until paid and costs. Filed with the judgment was this agreement: "It is agreed, that judgment shall be entered in this case in favor of the plaintiff for forty-five hundred dollars, with interest from this date and costs. The said judg-

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ment is to be held by the plaintiff as security for the re-payment to it as the same may become due, of all moneys which it may loan or advance to the defendant between this date and the 1st day of January, 1876, and for the payment at maturity to the plaintiff of all indebtedness of the defendant to the plaintiff which the defendant may contract or incur during that period, but so that the amount of such loans, advances and indebtedness shall not exceed in all forty-five hundred dollars, when such loans, advances and indebtedness shall be paid to plaintiff in full, then the said judgment shall be stricken out."

It is admitted that the proceeds of sale, in the hands of the trustee (\$693.00) for distribution, arise from the sale of the insolvent's leasehold interest in certain lots leased for ninety-nine years, renewable forever, to the insolvent, by the appellee. "It is also admitted, that the said Jones (the insolvent) contemplating borrowing money from the said Consolidated Real Estate and Fire Insurance Company of Baltimore, a body corporate, and duly incorporated under the laws of Maryland, and in pursuance of *an agreement* whereby the said company was from time to time, to make certain advances to said Jones for the erection of certain buildings and improvements on said lots, and to secure the same, confessed the judgment in favor of said company, prior to the commencement of the said buildings, and upon the terms filed with said judgment, a copy of which terms is herewith filed, and marked 'terms of judgment, A No. 1,' and which it is agreed shall be taken as a part of this statement of facts." It is admitted also, "that there was a mortgage of even date with the lease and the judgment, executed and recorded prior to the commencement of the buildings to secure the advances and loans mentioned in the terms of the judgment, which advances were to be made to the said Jones, to be used in the construction of the said buildings and improvements, in the amounts, and at the times fixed therefor in the said mort-

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gage, commencing with the laying of the first joist, and ending with the completion of the said buildings, all of which said payments and advances were actually made, subsequent to the commencement of the said buildings and improvements." It is also admitted that the materials, lumber, and work mentioned in the lien claims were furnished and done on and about the buildings at the times charged, and exceed in amount the sum of money for distribution. It is also agreed, that on this statement of facts, the Court should decide which lien had priority, and should ratify the audit, which was in accordance with his view of the law, reserving the right of appeal to each party.

The appellants contend, that as their lien by the law commences with the commencement of the building, and the advances of the appellee to Jones, the insolvent, by concession, were not made until after the building was actually begun, and by the terms of the agreement as specified in the mortgage mentioned in the agreement, were not to be made until after the building was commenced, the mechanics' liens are entitled to priority, notwithstanding the judgment antedates the commencement of their lien. To sustain this contention, he cites us to numerous cases, and among them to *Hopkinson vs. Holt*, 9 *House of Lords Cases*, 514, wherein the case of *Gordon vs. Grahame*, 7 *Vin. Abr.*, 52, and 2 *Eq. Cases Abr.*, 598, has been overruled; which case, being as it is argued, the basis of this Court's decision in *Wilson, et al. vs. Russell, et al.*, (13 *Md.*, 495,) the appellants insist should now be overruled also.

The decision in 13th *Maryland* does not rest, and was not placed solely on the case of *Gordon and Grahame*; for this Court, mentioning the conflict of authority existing on the subject, and citing the various authorities upon both sides of the question, said that "the *weight of authority* sustained the principle established in *Gordon and Grahame*."

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The rule adopted by this Court in *Wilson and Russell*, is not so inflexible that it can have no exception. The peculiar circumstances of some cases might present us occasion to depart from that rule, for the purpose of doing absolute equity between the parties. Lord CRANWORTH, in his very able opinion in *Hopkinson vs. Holt*, (9 H. of Lds.), wherein he defends the rule of *Gordon and Grahame*, and dissents from the opinion overruling it, suggests a case where the rule ought not to be enforced. But this case is not one which requires us to depart in any degree from our former holding.

It is now the settled law of this State, and it may be regarded as the settled law almost everywhere, that a judgment may be taken to secure future advances and liabilities where there is an agreement to make those advances; "and any future advances not exceeding the amount of the judgment made thereunder will be covered thereby." *Neidig, Adm'r Neidig vs. Whiteford*, 29 Md., 183. In the present case it is admitted there was such an agreement. All we know on that subject, is derived from the admission of facts, upon which the case was considered and decided by the Court of Common Pleas. Not only by a fair construction of that admission, are we warranted in supposing there was an agreement on the part of the appellee to make the advances contemplated by the judgment; it is the only and unavoidable conclusion the Court below, or we could draw from the admission of facts. The agreement of facts not only says there was "such agreement," but it also admits that the mortgage, which was also taken for securing the same advances, fixed the precise times at which the advances were to be made. If there was no admission on the subject, it is not absolutely clear that the terms of the judgment subscribed by the parties, and filed as its basis, does not by necessary implication import such an agreement on the part of the appellee to make the advances, as *Neidig's*

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*Case*, and the other cases on the subject contemplate. For the purposes of this case, however, it is not necessary to pass on the effect of the terms of the judgment in that regard, and we do not pass on that, but rest our decision upon that branch of the case wholly on the admission of record, that there was such an agreement to make the advances secured by the judgment. The advances were made, and the appellee claims allowance on account of them in preference to the mechanics' liens of the appellants. The Act of 1872 modifying the law in respect to mortgages to secure such advances, has no effect on a case like the present, which is rested on the judgment lien; the judgment having been taken for the whole amount intended to be loaned. That judgment being of record was notice to the world of its existence, as a lien from its date against the property of the judgment debtor. The lien existed, and execution could have issued, for there is no stay of execution entered. Equity it is true might have restrained a sale attempted under it, if it appeared that the advances forming the debts for which it was given, or no part of them had been made. But we see no ground upon which execution could have been refused at any time for such advances as may have been made. It is the right to execution which is supposed to support the lien accorded to judgments, but it is not necessarily a right to immediate execution. A judgment entered with a stay of execution is no less a lien from its date, because the right to issue execution is suspended for a time. The lien relates to, and begins from the date of the judgment, and as between different execution creditors, the priorities are always fixed; not from the date when the executions of each, of right, might have issued, but from the date of the judgments respectively. This judgment creditor had his lien by his judgment, and made his advances resting upon it, but the appellants contend that inasmuch as the advances were actually made

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after the buildings were actually begun, their liens must take precedence, because the statute is supposed to give such lienors a lien from the commencement of the building. The lien of the material man for the materials he furnished by the express language of sec. 23 of Art. 61 of the Code, commences from the time the materials are furnished. It is true that the lien for work done has been decided, to date from the actual commencement of the work on the building. *Brooks vs. Lester, et al.*, 36 Md., 65; *McShane, et al. vs. Jean, et al.*, 38 Md., 288; *Kelly & Martin vs. Rosenstock & Stein, et al.*, 45 Md., 389.

The 15th sec. of Art. 61, expressly postpones to such liens all mortgages, judgments, liens and encumbrances which attach upon such building or the grounds covered thereby, "subsequently to the commencement thereof." This judgment is not embraced within the letter of the statute, for it was confessedly entered *before* the building was commenced; but it is insisted, that it is embraced within the spirit of the statute, and is to be postponed to the appellants' liens. The contention of the appellants involves this assumption, that, while the appellee's judgment was a lien when they did the work and furnished the materials, their lien for work and materials is superior in equity, though dating subsequently, because the statute favors them over the judgment; notwithstanding, in point of fact, the advances may have been made before the work was all done, or the materials were all furnished.

It does not appear at what dates the advances were made, though it is admitted, for the purposes of this decision, that they were all made after the building was actually begun. For aught that appears, therefore, the advances may have been made, in fact, before the bulk of the materials was furnished, and the work was but partially done. If the rights of the parties are to be adjusted according to the dates when the liens by law, became such, the judgment being earlier in date was properly



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awarded priority. If the liens are to be regarded as constructive only, and that notice of one or the other must control as the party had notice, still the judgment debtor has the superior equity; for his judgment was already of record and was notice to the appellants of its existence and the rights acquired under it, before theirs began, and theirs were created with a full knowledge of the fact, and of the law in Maryland controlling the respective priorities. But it is argued that the advances were not made till after the building was actually commenced, when some of the materials, at least had been furnished, and the law gave the appellee notice that a lien might be claimed; and therefore the judgment creditor must be postponed. Here again the judgment creditor replies, and with much force, that his advances, by the terms of the agreement, (of which the appellants had full notice,) were made for the express purpose of defraying the expenses of putting up the buildings and making the improvements. He most reasonably might suppose the money he advanced had paid for the materials and work for which the appellants now claim liens. No claim was then preferred. Therefore, appellee had no notice of a *debt* for which a claim would be set up to lien, and advanced the money covered by his judgment, without notice of their claim, while they had notice of the judgment. In any aspect of this case as presented, appellee's claim was entitled to the priority which was accorded to it. The order ratifying the audit which gave it that priority will be affirmed.

*Order affirmed with costs.*

(Decided 16th December, 1880.)

FRANCIS DODGE and others vs. L. G. STANHOPE and JAMES B. McLAUGHLIN, trading as STANHOPE & McLAUGHLIN and others.

*Practice in Equity—Costs—Appearance Fees—Incompetency of a Defendant to testify as to transactions with Complainant's Intestate—Objections to Testimony at Hearing—Declarations of a Grantor made after execution of Deed—Statute of Limitations—Testimony before the Auditor—Distribution under a Deed of Trust—Equities of Assignees of Notes—Rights of Judgment Creditors in Equity.*

The question of costs is a matter within the discretion of the Court below. A decree, in other respects right, will not be disturbed, even if there was an improper direction as to the party or fund charged with the payment of costs.

Appearance fees should not be allowed on exceptions to an auditor's accounts, or other collateral proceedings in chancery upon petition.

A defendant in equity is incompetent to testify as to transactions between the complainant's intestate and himself; and objection to his testimony is not waived by his cross-examination before the auditor, as such objections may always be taken at the hearing in equity.

Declarations of a grantor in a deed or bill of sale impairing the rights of those claiming under the instrument, made subsequent to its execution, by which declarations, claims barred by the Statute of Limitations would be revived, are inadmissible against the grantee and those claiming under it.

Testimony of a witness taken by the auditor without authority of Court, after the account which it concerned, had been filed, is inadmissible.

Where debts of a grantor of land conveyed by deed in trust to secure certain notes therein mentioned, did not arise till long after the period (from the execution of the deed till its registration) in which the class of claims designated by this Court, as entitled to distribution under the deed, should accrue, they should be excluded from distributive shares of the proceeds.

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Assignees of notes are entitled to all the equities of the assignors.

The prosecution of claims to judgment, cannot diminish the rights of a creditor in a Court of Equity who applies for a distributive share of the proceeds from the debtor's property sold under a deed in trust.

APPEAL from the Circuit Court for Washington County, in Equity.

The case is stated in the opinion of the Court on this appeal, and also on the former appeal reported in 52 *Md.*, 483.

The cause was argued before BARTOL, C. J., BOWIE, MILLER, ALVEY and IRVING, J.

*Tryon Hughes Edwards* and *Wm. Shepard Bryan*, for the appellants.

*Edward Stake* and *A. K. Syester*, for the appellees.

BOWIE, J., delivered the opinion of the Court.

This cause was before this Court at April Term, 1879, on the appeal of *Lewis G. Stanhope and James R. McLaughlin, and others vs. Francis Dodge, et al.*, and by a decree of the 17th July, 1879, was remanded under Art. 5th, sec. 28, of the Code, to the Circuit Court for Washington County, without reversing or affirming the order appealed from, for further proceedings therein, in accordance with the views expressed in the opinion of the Court accompanying the order. The subject of the appeal, is the distribution of the proceeds of the real estate of Wm. Dodge, sold by trustees, under a decree of the Circuit Court for Washington County, as a Court of equity. The former appeal, (as the present,) was from a *pro forma* order of the Court below, ratifying and confirming the auditor's account.

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On the former appeal, this Court, among other things decided, first, that certain sums charged on the lands conveyed to Wm. Dodge, by his brothers and sisters, by deed dated the 20th of March, 1854, for equality of partition, in the division of their father's estate, were preferred liens, and as such, to be paid in full out of the proceeds of the land sold by the trustees.

These claims are numbered 1, 2, 3, are allowed by the auditor in account No. 2 restated, and no exception is taken, or question raised as to them.

2ndly. The Court further decided, that the deed of the 14th of February, 1863, from Wm. Dodge and wife, to Alexander and Allen Dodge, as trustees, to secure certain notes therein mentioned to Mary B. Marbury, Wm. Marbury, Jr., Anna Davis and Elizabeth Offley, gave a preference to the debts secured by it, over the debts of Wm. Dodge, contracted after its date, with notice of said deed; and over his debts contracted after August 25th, 1869, the date of its being recorded; but the debts contracted after the date of the deed, and before it was recorded without notice thereof, were entitled to distribution *pari passu*, with the claims secured by the deed. In the language of the opinion, "the debts of Wm. Dodge created before the date of the deed, or thereafter, with notice of the deed, must be postponed to the claims thereby secured, and in the same manner, the parties secured by the deed, are entitled to priority over all creditors who became such after the 25th of August, 1869, *when the deed was recorded*."

"But the debts contracted after the date of the deed, and before it was recorded and without notice thereof, these, if they are merely general creditors, who have not acquired liens on the land, are entitled to come in *pari passu*, with the parties whose claims are secured by the deed, and participate with them ratably in the distribution, and if they have acquired liens on the land, they

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are entitled to priority over those in whose favor the deed was made.

“This rule of distribution results from the construction of Art. 24, sec. 19, and Art. 16, sec. 23, of the Code, and from adjudged cases, *Pannell & Smith vs. Farmers' Bank of Md.*, 7 H. & J., 212; 41 Md., 506; 48 Md., 267.”

By an agreement of counsel contained in the record of the first appeal, it was stipulated that if the Court of Appeals shall reverse the said order of ratification, “any and all the creditors and sureties of said Wm. Dodge, shall have the right to file their claims in said cause, and have such distribution as they may be entitled to under the law subject to all exceptions.”

Pursuant to the order remanding the cause, the special auditor proceeded to take testimony in support of the claims filed by the creditors under the foregoing agreement, and restated the account, now designated as Account No. 2, restated, and also stated an account under the directions of the appellants, and reported the same with the evidence to the Court below. To which Account No. 2 restated, the appellants, Francis Dodge, and others, trustees, and other claimants excepted. The account being ratified, Francis Dodge, and others, trustees, appealed.

The first series of appellants' exceptions, are to the allowance of various items of costs, too minute and numerous to be recited, but which were incurred in the course of the conduct of the suit between the parties in the Court below, and in the former appeal or consequent thereon, viz., costs allowed on exceptions to account No. 2, costs on the petition of Rowland, costs of record, costs of appellants and appellees in the Court of Appeals, all of which are excepted to as not properly chargeable to the exceptants.

In the consideration of this question, it should be remembered that from the nature of the proceedings it is obvious, the object of the former as well as of the present

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appeal, was to procure an authoritative and final decision of the rights of the respective parties to the proceeds of the lands to be distributed. In the first appeal, Messrs. Stanhope and others were appellants, and the Messrs. Dodge, trustees, the appellees. The position of the parties is now reversed.

There were undoubtedly grave doubts and difficulties as to the equitable and legal rights of the contestants, which could only be solved by a Court of final resort. The costs for the most part, were the necessary and inevitable consequence of the complicated condition of the debtor's estate.

Although some of the present appellants' claims were established by the decree on the first appeal, in which they were appellees; yet this Court did not in their action on that appeal, affirm or reverse the decree below, but sent the case back for further proceedings without any direction as to costs.

The appellants in the former appeal cannot therefore be said to have set up a false claim, although they may have failed to recover.

In the case of *Calvert vs. Carter*, 18 Md., 111, it is said: "it is not the province of the auditor to tax the costs in his account, but his having done so, is no ground for reversal, inasmuch as the subject of the costs was not specially disposed of by the decree below, and will be provided for by the decree of this Court.

In more recent cases, it has been repeatedly held by this Court, that the question of costs is a matter resting in the discretion of the Court, from the exercise of which no appeal will lie. *Mears vs. Moulton*, 30 Md., 145. Again in 34 Md., 107, it was held that a decree in other respects right will not be disturbed, even if in the opinion of the Court of Appeals, there was an improper direction as to the party or fund charged with the payment of the costs. *Hamilton vs. Schwehr, et al.*, 34 Md., 107.

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The object of the suit in this case, being the distribution of the proceeds of sale for the benefit of creditors, all or most of whom were *prima facie* entitled to participate, the costs allowed by the auditor in account No. 2 restated, were generally properly chargeable against the fund before distribution.

There is however no authority for charging appearance fees on exceptions to auditor's accounts, or other merely collateral proceedings in chancery upon petition, and the auditor in restating his account should exclude such items.

Separate and specific exceptions are taken by the appellants to claims numbered 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20.

These exceptions are to the amount of the dividend allowed; the want of proof of the claim; the Statute of Limitations, and the exclusion of the claims, because it is not shown by the evidence they accrued between the date of the deed of February 14th, 1863, and the 25th August, 1869, the date of its registration, without notice.

Besides the exceptions to the claims for the reasons above assigned, the appellants excepted to the testimony taken in support of these claims, and especially to the effect of the admission of fact made in the agreement as to the claims of Knepper and Gardner, (Nos. 12 and 20, account No. 2 restated,) and to all such parts thereof as go to avoid the effect of the Statute of Limitations pleaded to said claims, and as to the applications of payments as made by William Dodge after the deed of trust.

In maintenance of these exceptions to evidence, it is insisted: 1st. That all evidence given by William Dodge, of promises, acknowledgments, payments, etc., by him made more than three years *before* the filing of the claims, and all testimony given by others of such admissions, promises, payments, etc., by Dodge, made more than three years *before* the filing of the claims, is inadmissible to establish or prove said claims, or to avoid the bar of the Statute.

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2nd. That all evidence given by William Dodge, of promises, acknowledgments, payments, etc., by him made after the making of said deed, and all evidence by others, of promises, acknowledgments or payments by said Dodge, after the making of said deed is inadmissible to prove said claims, or avoid the bar of the Statute, as said William Dodge had, after the making of said deed, no power by his act to bind the trust estate or alter the course of distribution of the trust funds.

3rd. That the endorsements on notes offered as evidence to avoid the Statute are not proven, as by law they are required to be, nor is the fact of payments mentioned in said endorsements proven as required by law.

4th. That where judgments obtained after the date of the deed are offered to avoid the Statute, said judgments are not of any effect to avoid the bar of the Statute.

5th. That where sealed notes dated after 1869, given on accounts antedating August 25, 1869, are offered as evidence to avoid the bar of the Statute, said notes have merged the original indebtedness, and cannot be considered as keeping alive the original account or debt accrued before August 25, 1869.

6th. That evidence offered of any agreement made or act done by said Dodge after said deed, to apply payments made or received by him before the date of said deed is inadmissible, because said Dodge had no power after making said deed, to apply payments by him made or received before the date of said deed, or by any act of his to bind the assets of said trust estate, or alter the course of distribution thereof.

The objection of want of proof to sustain the several claims, or remove the bar of the Statute of Limitations, involving necessarily the competency of the evidence offered for those purposes, it follows of course that in disposing of the exceptions to the claims, we must decide the exceptions to the testimony, and they will therefore be considered together.



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All of the claims, have the general and common feature of having originated between the 14th of February, 1863, and 25th of August, 1869, they being alone within the class of creditors entitled by the terms of the decision on the former appeal, to share *pari passu* with the *cestuis que trust* under the deed of the former date.

Standing alone then, they will be liable to the bar of the Statute of Limitations, unless by some legal process, or other act *in pais*, between the parties to the contract, they are kept alive as against the parties claiming under the deed. No. 9, the first in the series of exceptions, will furnish as well as any other, a subject for the examination and application of the rules by which their allowance will be decided.

This claim is an open account of Edward J. Ridenour, Adm'r of Rebecca Reed, against Wm. Dodge, Exhibit E. R.

On its face, it is for services rendered by R. Reed, to Wm. Dodge, from 14 February, 1863, to July 29, 1867,	
@ \$1.25 per week.....	\$290 00
Interest on same from the end of each year.....	255 60

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\$545 60

The claimant deposed that he knew his intestate had rendered the services charged, at the price charged, and that within three years last past, since he became administrator, he had talked with Mr. Dodge about the account, and Dodge promised to pay it.

Dodge, being examined by the exceptants, after objection to his competency by the claimant, testified that he had paid Miss Reed several large sums of money on account of her services, and that she was not in his service for a considerable portion of the time charged, and that he never admitted the account in the form in which it was presented.

Mr. Dodge was objected to by the claimant, on the ground that the other party to the contract was dead.

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To counteract which, it was urged, that the claimant had waived this objection by cross-examining the witness before the auditor.

It is clear that Mr. Dodge was incompetent to testify as to any transactions between the deceased intestate, and himself; nor was the objection to his testimony waived by his cross-examination, such objections may always be taken at the hearing in equity.

Dodge's declarations to the claimant, assuming them to have been made within three years of the time of the witness' examination and filing of the claim, were long after the debt had by presumption of law ceased to exist, and being after the registration of the deed, were inadmissible to revive the claim against the creditors claiming under it.

The declarations were *res inter alios* as to them, and could not prejudice their interests, after their rights were consummated by the registration of the instrument.

It has been frequently decided by this Court, that declarations of a grantor, in a deed or bill of sale, impairing the rights of those claiming under the instrument, made subsequent to its execution were inadmissible against the grantee and those claiming under it. *Reese vs. Reese & Smith*, 41 Md., 558; *Cooke vs. Cooke*, 29 Md., 550.

The deed in this case was not operative, as to subsequent creditors until recorded, but when recorded, became as potential to divest the powers of the grantor over the property conveyed, as if recorded in due time.

Claims No. 10 and 11, are notes of Wm. Dodge to Caspar Swope, dated 1st May, 1865, and 3rd April, 1869, respectively, the first for \$200, the second for \$100, payable on demand.

On the first note is endorsed, "received interest on the within note to November 9, 1877." On the second is endorsed, "received interest on the within note to April,

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3, 1874; received interest on within note to August 23, 1876;" "by credit on the within of \$26.36, August 23, 1876;" "by credit on the within of \$22.02, November 9, 1877."

The auditor in the report filed 12th January, 1880, with the account No. 2 restated, reports these claims without any evidence of their execution, or proof of the endorsements, in these words "Nos. 10 and 11, are upon notes dated May 1st, 1865, and April 3rd, 1869." Subsequently, on the 29th of January, 1880, without any apparent authority from the Court, he took the testimony of Casper Swope in the presence of the solicitors for exceptants and claimant. The solicitor for the exceptants moved to strike it out because it was taken after the account was stated and filed.

The evidence of Swope, if admissible, establishes nothing more than the execution of the notes and the making of the endorsements. The notes were out of date when the first endorsements were made, the payments of Mr. Dodge after that period could not revive them against the creditors secured by the deed, especially as these credits are subsequent to the 25th August, 1869, the date of the registration of the deed. But, independently of all other objections, the testimony seems to have been taken without authority of the Court, after the account had been filed, and therefore is inadmissible. 44 *Md.*, 468.

Knepper's claim, No. 12, is accompanied by no proof in the evidence returned by the auditor, but there is an agreement in the record between the solicitor for Gardner and Knepper, and the solicitor for the exceptants, that the indebtedness of Wm. Dodge to said Knepper and Gardner as allowed in the auditor's account, shall be admitted as against Wm. Dodge and as acknowledged by him within three years from the date of the agreement, (March 18, 1880,) the exceptants having the right to object to the admissibility of this testimony, on the ground

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that it should have been proven before the auditor before the account was stated.

These accounts being numbered 12 and 20, are excepted to, as being unproved, barred by the Statute and not shown to have been contracted without notice of the deed.

They are excluded by the Statute of Limitations according to the principles heretofore expressed in this opinion, and it is unnecessary to dwell upon other objections.

Claims Nos. 13 and 14, of John F. Ankeney, are returned by the auditor, as being notes dated February 19th, 1864, and July 30th, 1866, without any proof of their execution, or of any acknowledgment of their being unpaid. By a written agreement of the counsel of the exceptants and claimant filed during the argument, the execution of these notes is admitted, without affecting the plea of limitations.

These claims are excepted to on the ground of their being barred by the Statute, and it is apparent from their face, that the objection is well taken.

Although not material as to the result, it may be proper to mention that the first of these claims described as notes, appears to be a single bill. The endorsements of payments thereon of the principal or interest are not proved, and if established by competent and legal evidence, would not save them from the effect of the plea of limitations.

No. 15, claim of David Seibert, arises on a judgment of the Clearspring Bank against Wm. Dodge and Seibert. Mr. Dodge being indebted to Seibert on sundry notes dated March 29, 1862, February 8, 1862, May, 1863, January, 1869, amounting to \$1826, negotiated a loan with the bank on a note endorsed by Seibert for \$1500, with the proceeds of which Dodge took up the former notes, leaving a balance due Seibert on note of \$250. A judgment for \$950, balance due on the note of Dodge and Seibert after curtailment and renewals, was rendered against them at February Term, 1877; one-half of which is adopted by the auditor as the basis of the claim against Dodge.

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One of the exceptants' counsel contends that upon a proper application of the payments of Dodge to Seibert, the whole claim would be extinguished. The other insists if the claim is not satisfied, the amount of the claim on which the dividend was declared was much too large. On the other hand, the claimant contends the amount of his claim has been reduced below its proper sum.

It is impossible after the great interval of time which has occurred since the claims accrued, and the numerous items of account between the claimant and Mr. Dodge, to ascertain the exact amount of the claims which accrued between the date of the deed of trust, the 14th February, 1863, and its registration, 25th August, 1869. The settlement between Dodge and Seibert in March, 1869, merged all the antecedent debts in the new obligations; the old notes were then cancelled, in the language of the witness.

The discounting of the note of Dodge endorsed by Seibert, was a change of securities *pro tanto*. Dodge becoming primarily liable for its amount to the bank, instead of owing Seibert, whose claim to that amount was extinguished.

The responsibility as endorser was a contingent liability which did not mature until the judgment was rendered, and he was compelled to pay the amount.

The debt of Dodge to Seibert on this judgment did not arise until long after the period which the class of claims entitled to distribution should accrue, as designated in the former opinion of this Court, *i. e.* between the 14th February, 1863, and the 25th July, 1869; and it therefore follows it should be excluded from the distribution.

No. 16, claim of William C. Ernst, arises from his endorsement about three or four years since, of a note of William Dodge for \$950, together with Seibert, discounted by the Savings Institute of Clearspring, which note not being paid, judgment was afterwards recovered thereon against the endorser at May Term, 1877, and Ernst paid

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one-half of the same. The indebtedness of Dodge to the claimant in this instance, was clearly contracted too long after the execution of the deed of the 14th February, 1863, and its registration on 25th August, 1869, to entitle it to any distributive share of the funds to be divided in this case.

Claim No. 17 is balance of account as per report, and interest from December 23, 1871, of administrators of Jacob Brewer.

It appears from the report that this balance is arrived at, by deducting the credits from Mr. Brewer's account paid since August 25th, 1869. As far as appears from the record, no account is presented by the claimants' administrator and filed, but the transaction between Dodge and Brewer are opened up, in order to ascertain what was due to Brewer prior to the 25th August, 1869, to bring the claim within the period, excepted from the operation of the deed of the 14th February, 1863.

The testimony of Dodge, who was first called by the claimants and cross-examined by the exceptants, showed that in February, 1863, he owed Brewer \$32.89; afterwards they had large dealings, and in January, 1872, Dodge gave Brewer his single bill for \$2400, in settlement of the account. Hence it appears the open account was merged by taking a security of a higher nature some years after the deed of February, 1863, was recorded.

No. 18. The Washington County National Bank, use of Cushwa, Wilson & Kreigh, seems to have arisen on notes executed by Wm. Dodge, and endorsed, and negotiated by the bank, for the maker, between the 6th of May, 1863, and October, 1866. These notes were consolidated in May, 1868, and renewed from time to time with the present assignees as endorers. The assignees are entitled to all the equities of the assignors. The prosecution of the claims to judgment, cannot diminish the rights of the creditor, in a Court of equity.

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There seems to be no well founded objection to the allowance of the dividend assigned to it.

No. 19. The executors of John Renner, is a balance on account accruing between 1863 and 1867. The indebtedness is sufficiently proved, but it is barred by the plea of limitations relied on by the appellants. It results from the foregoing views, that the exceptions to the several items of costs allowed by the auditor in account No. 2 restated, and to the claim of the Washington County National Bank, use of Cushwa, Wilson & Kreigh, No. 18 in said account No. 2 restated, are overruled; and the exceptions to claims No. 9, 10, 11, 12, 13, 14, 15, 16, 17, 19 and 20 are sustained. Exceptions to claim No. 4 were withdrawn by agreement of counsel, filed during argument.

The order ratifying account No. 2 restated, will be reversed, and the cause remanded that another account may be stated and distribution made, in conformity with the views hereinbefore expressed. The costs of this appeal to be paid out of the fund.

*Order reversed, and  
cause remanded.*

(Decided 16th December, 1880.)

## STATE OF MARYLAND vs. JOHN HODGES.

*Writ of Error on Judgment quashing an Indictment—Indictment for Receiving Stolen Goods—Contra Pacem—Common Law Offence—Punishment for Receiving Stolen Goods prescribed by the Code.*

A writ of error lies on a judgment quashing an indictment on demurrer, such judgment being a final judgment.

The offence of receiving stolen goods is in this State, a misdemeanor. In such a case, it is not necessary to allege in the indictment that the property in question was feloniously received; nor need such indictment charge that the traverser received the stolen goods for the purpose of converting them to his own use.

It is not necessary that the receiving should be *lucri causa*. If one receives stolen goods knowing them to be stolen, for the mere purpose of concealment without deriving any profit at all, or merely to assist or aid the thief, such a receiving is within the statute.

But an indictment for receiving stolen goods, a common law offence, should charge that the same were unlawfully received.

Where one is charged with a common law offence, the mere averment that it was done *contra pacem* does not dispense with the necessity of setting out in proper terms, the circumstances necessary to constitute the alleged common law offence.

In this State the Code merely prescribes the punishment for receiving stolen goods, and does not in any manner change the nature or character of the offence itself.

PETITION in the nature of a writ of error from the Circuit Court for Baltimore County.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., MILLER, ALVEY and ROBINSON, J., for the appellant, and submitted on brief for the appellee.



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*Charles J. M. Gwinn, Attorney-General*, for the plaintiff in error.

It is settled in this State that when an indictment is demurred to, and the demurrer is sustained and the indictment quashed, the State is entitled to have the record removed by petition as upon a writ of error into this Court. *State vs. Buchanan*, 5 *H. & J.*, 329, 330; *State vs. Boyle*, 25 *Md.*, 519.

At common law he who aided a thief, by knowingly receiving him after such thief had committed a larceny, became an accessory, after the fact, to the felony. But it was not a felony, at common law, to receive, knowingly, from the thief, the property which he had stolen. 1 *Hawk. P. C.*, Book 1, ch. 19, sec. 8. That offence, at common law, was a misdemeanor only. *Ibid.* 1 *Hale P. C.*, 619, 620; 2 *East's Crown Law*, sec. 142; 2 *Russ. on Crimes*, 9th *Am. Ed.*, 541; 3 *Chitty's Criminal Law*, 5th *Am. Ed.*, 950, (a.) But by 3 *W. & M.*, ch. 9, sec. 4, any person buying, or receiving any stolen goods or chattels, knowing them to have been stolen, was made an accessory after the fact, to the felony. 6 *Evans' Statute*, 14, 49, Z Z; 3 *Chitty's Criminal Law*, 951; 1 *Hawk. P. C.* ch. 19, sec. 8. After this statute was enacted, no indictment for the offence as a misdemeanor could be sustained. 3 *Chitty's Criminal Law*, 951. And, unless the principal felon was convicted, the receiver, as an accessory after the fact, could not be convicted. 3 *Chitty's Criminal Law*, 951; 2 *Hawk. P. C.*, Book 2, ch. 29, sec. 11; 2 *East's Crown Law*, 744, 745.

This difficulty was remedied in England by 1 *Ann*, Statute 2, ch. 9, sec. 2, which provided that, if the principal felon could not be taken, it should be lawful to prosecute such offence as a misdemeanor, although such principal felon was not convicted. 6 *Evans' Statute*, 50.

The Statute of 5 *Ann*, ch. 31, secs. 5 and 6, declared that the receiving of stolen goods, knowing them to have been stolen, and the receiving or harboring of the thieves

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themselves, made the persons so offending accessories after the fact; but it is provided that if the principal felon could not be taken, so as to be prosecuted and convicted, the receiver might be prosecuted for a misdemeanor. 6 *Evans' Statute*, 50; 1 *Hawk. P. C.*, ch. 19, sec. 8; 3 *Chitty's Criminal Law*, 951.

Under the statutes 3 *W. & M.*, ch. 9, sec. 4, and 5 *Ann.*, ch. 31, secs. 5 and 6, it was held by the twelve Judges, that a receiver of stolen goods might be prosecuted and convicted of the offence as a misdemeanor, although the principal felon was known, unless it appeared *from the finding of the jury*, that the principal felon was out of custody by collusion, and could have been taken and convicted when the indictment against the receiver was found. *Wilkes' Case*, 1 *Leach's Crown Law*, 103, 104; 3 *Chitty's Criminal Law*, 951. A like ruling was in effect made in *Thomas' Case*, 2 *East's Crown Law*, 781.

If therefore it be true, *Kilty's Rep. on Statutes*, 179, 180, that the Statutes of 3 *W. & M.*, ch. 9, sec. 4, 1 *Ann.*, ch. 9, sec. 2, and 5 *Ann.*, ch. 31, secs. 5 and 6, ever extended to the province of Maryland, the indictment in this case was good under the Statute of 5 *Ann.*, ch. 31, secs. 5 and 6, as for a misdemeanor; because it does not appear in the record that the principal felon was known, or that he was out of custody by collusion, and could have been convicted when this indictment was found.

It was unquestionably good under the Act of 1809, ch. 138, sec. 6, sub-clause 8, as codified in 1 Code, Article 30, section 163, because it is plain from the words of this sub-clause that its purpose was to disregard the different definitions given to the offence by the statutes in question—to refer to the common law offence by proper descriptive words—and to affix a proper punishment to such common law offence. It is because this purpose was plain, that the offence has always been dealt with in this State since 1809 as a misdemeanor. *Kearney's Case*, 46 *Md.*, 16.

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There was no need to set forth in the indictment any intent on the part of the defendant in error, to appropriate to his own use the goods which he received, knowing them to have been stolen. The offence defined by the Code, Article 30, section 163, is "the crime of receiving any stolen money, goods or chattels, knowing the same to be stolen." If the defendant in error received the property knowing that it had been stolen, for the mere purpose of concealment, without deriving any profit from the transaction, he was just as much a guilty receiver of the property as if he had knowingly purchased it from the thief. *Rex vs. Richardson*, 6 C. & P., 335, cited in 2 *Russ. on Crimes*, 9th Am. Ed., 554; *Rex vs. Davis*, 6 C. & P., 177; 25 E. C. L. Rep., 341, 343; *Rex vs. Jervis*, *Ibid*, 330; 2 *East P. C.*, 765.

The gist of the offence of receiving stolen goods is the guilty knowledge of the offender. 2 *Russ. on Crimes*, 9th Am. Ed., 561; 1 *Wharton's Criminal Law*, 8th Ed., 1880, sec. 983. That averment is correctly made in the indictment. If the allowance of the demurrer can stand upon no other grounds, than those upon which it appears to have been placed by the lower Court, its judgment must necessarily be reversed.

But a demurrer to an indictment makes the examination of the whole of that indictment necessary; and it is my duty to consider another question which is presented by the indictment, but does not appear to have been noticed below, in order that the proper form of an indictment, in cases where persons are charged with receiving stolen goods, may be definitely settled.

The question of real importance is, whether this indictment is defective, because of the omission of any averment that the person charged—*unlawfully* "did receive and have, &c."

As the offence under consideration has been made in general a felony in England, by the Statutes of 3 W. & M.,

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ch. 9, sec. 4; 5 *Ann.*, ch. 31, secs. 5, 7 and 8; *George 4*, ch. 27, sec. 54, and 24 and 25 *Vict.*, ch. 96, sec. 91, there are necessarily few English precedents accessible of indictments for misdemeanors, with which the indictment in this case can be contrasted.

It is my duty to bring to the attention of the Court the only English prosecutions, capable of being drawn into precedents which I have observed. These were certain excepted cases, which could be prosecuted as I have shown, as misdemeanors under the Statutes of 3 *W. & M.*, ch. 9, sec. 4, and 5 *Ann.*, ch. 31, sec. 5; *Wilkes' Case*, 1 *Leach Cr. Law*, 103, and *Morris' Case*, *Ibid*, 468, are examples of such prosecutions. The Statute of 22 *George 3*, ch. 58, afterwards repealed by 7 and 8 *George 4*, ch. 27, sec. 1, would appear to have converted into misdemeanors large classes of receivings of stolen goods. *Haslam's Case*, 1 *Leach Cr. Law*, 418, is an example of a prosecution under this statute. The reports of the cases referred to do not give the particular words of the indictments. In 2 *Chitty's Crim. Law*, 5th *Am. Ed.*, 998, (a,) there is, however, a form of an indictment, under the Statute of 22 *George 3*, ch. 58, taken from another book of precedents. In it is the averment that the act charged was done "unlawfully;" and the further averment certainly unnecessary, that it was done "for the sake of wicked gain."

The question to be determined is, whether the word "unlawfully" in this precedent, was in truth a *necessary* word. It is proper to have recourse to precedents in this country; for the offence is dealt with under the Federal law, and in several States as a misdemeanor, as it is in this State.

Under the Act of Congress of March 3rd, 1825, section 8, 4 *U. S. Stat. at Large*, 116, *Revised Statutes, U. S.*, section 5357, it was provided that if any person upon the high seas, or in any waters within the admiralty, or maritime jurisdiction of the United States, and out of the juris-

diction of a particular State, should receive any property which might be the subject of larceny, and which had been taken or stolen from any other person, "knowing the same to have been taken or stolen," he should be deemed guilty of a misdemeanor.

It appears that in indictments in the Federal Courts no averment is made that the stolen goods were "unlawfully" received. *Wharton's Precedents of Indict.*, 2nd Ed., 421. Indeed, in the general precedent, which is given by the author as a proper form in all cases of receiving stolen goods—section 450—the word "unlawfully" is wholly omitted.

It is plain that the pleader, in drawing the indictment in question in this case, adopted the general form prescribed by Wharton in the section 450 which I have referred to. Is the form given by Wharton correct or erroneous?

This inquiry obliges me to state in a simple and compact form, the elementary rules governing the framing of indictments. "An indictment is nothing else but a plain, brief and certain narrative of an offence committed by any person, and of those necessary circumstances that concur to ascertain the fact and its nature." 2 *Hale P. C.*, margin page 169.

When the offence charged was not an offence at common law, but was made an offence by statute, it is sufficient to set out the circumstances contained in the statutory definition of the offence, and to bring the accused within its material descriptive words. 1 *Starkie Criminal Pleading*, 178.

When the offence charged is an offence at common law, it is necessary only to set out the proper words, which express directly, or by necessary inference, the circumstances necessary to constitute the alleged common law offence. *King vs. Horne, Cowp.*, 679, Lord MANSFIELD, 688, ASTON, J. *King vs. Stevens and Agnew*, 5 *East*, 259, 260, ELLENBOROUGH, C. J.

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When the offence charged is an offence at common law, which is made punishable by statute, it follows that it is only necessary to set out the circumstances necessary to constitute the alleged common law crime, concluding *contra formam statuti*, for the guidance of the Court in imposing the penalty, and *contra pacem*, because the offence itself tended to the disturbance of the quiet and peaceable government of the State. 2 *Hawk. P. C.*, ch. 25, sec. 92; 1 *Starkie Criminal Pleading*, 209.

In this case an offence at common law, which is made punishable by statute, is charged in the indictment. The offence charged was the receiving and having certain goods, knowing that they had been before that time feloniously stolen. The act thus committed was not an act indifferent in itself, which required a specific allegation and proof of the intent with which it was done. *King vs. Philips*, 6 *East*, 474, 475. It was in itself an act which was *prima facie* a breach of the law. That it was such breach of the law, and therefore unlawfully done, is averred when such act is expressed to have been committed against the peace of the State. The words "*contra pacem*," are not formal words only, but are material words expressive of an unlawful intention, which cannot be omitted in the description of a common law offence. 2 *Hawk. P. C.*, ch. 25, sec. 92; 2 *Hale P. C.*, 188; 1 *Starkie on Criminal Pleading*, 209. If they cannot be omitted in such description, because they are expressive of the unlawful intention with which the particular act was committed, does it not follow, as a necessary consequence, that when these words are used in an indictment, they do aver the unlawful intention with which such particular act was done? The averment "*contra pacem*," does not express or import more than this. It does not aid the omission of an averment of intent in an indictment, except the omission of an averment of an intent to commit a breach of law. But it certainly must be held to

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aid such omission, because the words "*contra pacem*," are in themselves an averment of such unlawful intent. See remarks of BRAMWELL, B., in *Queen vs. Goldsmith*, 1873, during argument as reported in 21 *Week. Rep.*, 792.

*John J. Yellott*, for the defendant in error.

This case is not properly before this Court for review at this stage, and should be dismissed, inasmuch as the record discloses no final judgment of the Court below, and there has in fact been no other judgment of that Court, than that sustaining the demurrer and quashing the indictment. There has been no judgment discharging the prisoner or passing upon the question of his guilt or innocence. The case still stands in that Court awaiting the further action of the State's attorney to bring it to a final issue. *Kearney vs. State*, 46 *Md.*, 422.

Should this Court decide that the case is properly before it for review, it is submitted that the action of the Circuit Court in sustaining the demurrer was proper. The indictment should allege that the goods were received with a fraudulent or felonious intent. *Wharton's Am. Crim. Law*, secs. 1899, 1901, 4th *Ed.*

ROBINSON, J., delivered the opinion of the Court.

The defendant in error was indicted for receiving stolen goods, knowing them to be stolen.

A demurrer was filed to the indictment, and the Court below sustained the demurrer and quashed the indictment.

A writ of error it is true will not lie until after final judgment, but the judgment in quashing an indictment is a final judgment. There can be no further proceedings upon the indictment, and although the prisoner may be held to bail to await the further action of the grand jury, yet so far as the pending indictment is concerned, he is entitled to his discharge.

There can be no question therefore, as to the right of the State to remove the record by petition as upon writ of error into this Court. *Rules of the Court of Appeals*, 29 *Md.*

It appears by the petition, that the demurrer was sustained upon the ground that the indictment did not charge a *felonious receiving* of the stolen goods, or any *intent* on the part of the receiver to *appropriate the goods to himself*.

The first question then is, whether the offence of receiving stolen goods, is in this State a felony or a misdemeanor?

All the books agree that such an offence at common law is but a misdemeanor punishable by fine and imprisonment. 1 *Hale's P. C.*, 619; 2 *East P. C.*, 142; 4 *Black.*, 38; 3 *Chitty's Criminal Law*, 950.

By the Statute 3 *W. & M.*, *ch. 9, sec. 4*, any person buying or receiving any stolen goods or chattels, knowing them to have been stolen, was made an accessory after the fact. After the enactment of this statute, no indictment for the offence as a misdemeanor would lie, because the misdemeanor was merged in the felony. 3 *Chitty's Criminal Law*, 951. And unless the principal felon was convicted, the receiver as an accessory after the fact could not be convicted. 2 *Hawk, P. C.*, *Book 2, ch. 29, sec. 11*; 2 *East's Crown Law*, 744. If then the principal felon escaped or was kept out of the way, the receiver went unpunished. To remedy this, 1 *Ann.*, *Statute 2, ch. 9, sec. 2*, provided that if the principal felon could not be taken, it should be lawful to prosecute such offence as a misdemeanor, although such principal felon had not been convicted.

And it was held in *Wilkes' Case*, 1 *Leach's Crown Law*, 103, by the twelve Judges, that a receiver of stolen goods might be prosecuted and convicted of the offence as a misdemeanor, although the principal felon was known, unless it appeared from the finding of the jury, that the principal was out of custody by collusion, and could have



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been taken and convicted when the indictment against the receiver was found.

If then it be true, that the Statutes of 3 *W. & M.*, *ch. 9*, *sec. 4*; 1 *Ann.*, *ch. 9*, *sec. 2*, and 5 *Ann.*, *ch. 31*, *secs. 5, 6*, extended to the province of Maryland, as stated in *Kilty's Rep. on Statutes*, 179, 180, the indictment in this case charging the offence as a misdemeanor was a good indictment, because it does not appear in the record that the principal felon was out of custody by collusion, and could have been convicted when this indictment was found.

The offence in this State has always been considered as a misdemeanor. *Kearney's Case*, 46 *Md.*, 16. It was not necessary therefore to allege in the indictment, that the property in question was *feloniously received* by the defendant in error.

In regard to the other question whether it was necessary to charge in the indictment, that the traverser received the stolen goods for the purpose of converting them to his own use, the authorities are all one way. If they were received with an honest intent, that is to say, for the purpose of keeping them for the owner, such a receiving would not of course be within the meaning of the law. But on the other hand it is not necessary, as in larceny, that the receiving should be *lucri causa*. If one receives stolen goods, knowing them to be stolen, for the mere purpose of concealment, without deriving any profit at all, or merely to assist or aid the thief, *such a* receiving is within the statute. 1 *Hale*, 620; *Rex vs. Davis*, *C. & P.*, 177. In this case, GURNEY, B., said "that if the receiver takes without any profit or advantage, or whether it be for the purpose of profit or not, or merely to assist the thief, it is precisely the same."

It is clear, therefore, that the Court erred in sustaining the demurrer to this indictment, for the reasons set forth in the assignment of errors. The record, however, is brought into this Court, at the instance of the State,

and it does not appear that the demurrer was sustained *solely upon the grounds set forth* in the petition filed by the State. It becomes necessary, therefore, that we should examine the whole indictment, for the purpose of ascertaining whether it be defective in other respects. And here it will be observed, that it nowhere charges that the property was *unlawfully* received.

Where the offence charged is an offence at common law, and is *itself manifestly illegal*, the averment that it was done unlawfully may not be necessary. 1 *Chitty Crim. Law*, 160 ; 2 *Hawk.*, Book 2, sec. 25. But the mere receipt of stolen goods, knowing them to be stolen, was not *per se* an offence at common law, because the owner may lawfully receive back his own goods, knowing them to be stolen, provided there be no agreement to favor the thief; or one may lawfully receive stolen property for the purpose of keeping the goods for the owner. 2 *East's Crown Law*, ch. 25, sec. 141; 1 *Hale*, 650. And accordingly we find in *Chitty*, *Archbold*, and in fact in all the books of forms, the averment that the goods were *unlawfully* received.

It was suggested in argument, that the words "*against the peace*," &c., to be found in the conclusion of the indictment is a sufficient averment, that the act was done unlawfully. The words *contra pacem*, it seems were considered necessary in all indictments, except for mere *non-feasance*, because all offences subject to public prosecution, tend to the disturbance of the public peace.

But where one is charged with a common law offence, the mere averment that it was done *contra pacem*, does not dispense with the necessity of setting out in proper terms the circumstances necessary to constitute the alleged common law offence.

It is a general rule, that nothing *material* shall be taken by intendment or implication, but that in all cases the indictment must describe with certainty the offence

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- of which the party is charged, and must aver the facts necessary to constitute such offence. 2 *Hawk.*, 83.

If it be an offence created by statute, it is only necessary to describe it in the language of the statute. In this State, the Code merely prescribes the punishment for receiving stolen goods, and does not in any manner change the nature or character of the offence itself. It is necessary, therefore, to set out in the indictment, all the circumstances necessary to constitute the offence at common law, and inasmuch as it was necessary at common law to constitute the offence, that the party charged should receive the property *unlawfully*, we are of opinion that it must be so averred in the indictment. The indictment in this case does not allege that the goods were unlawfully received by the traverser, and the judgment must therefore be affirmed.

*Judgment affirmed.*

(Decided 16th December, 1880.)

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GEORGE W. BISHOP and ISAAC W. M. HELM vs.  
THE STATE OF MARYLAND.

*Construction of Art. 30, sec. 24, of the Code—Forgery of an  
Endorsement on a Certificate of Baltimore City Stock—  
Proof of Guilty Knowledge.*

A certificate of indebtedness issued by the Mayor and City Council of Baltimore, known as City Stock, is a bond within the meaning of sec. 24 of Art. 30 of the Code, relating to forgeries.

An endorsement of such a certificate with fraudulent intent, may be a forgery within the meaning of the statute, though the certificate

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is upon its face transferable only at the Mayor's office in person or by attorney. This provision is for the protection of the corporation.

Where the appellants were indicted not only for forging the endorsement of K. on the bond set out in the indictment, but also for uttering the same knowing it to be forged, to prove guilty knowledge, it was competent for the State to show that on or about the time of the forgery charged in the indictment, the appellants held and uttered similar forged instruments.

APPEAL from the Criminal Court of Baltimore.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., ALVEY, ROBINSON and IRVING, J.

*F. X. Ward* and *Charles Marshall*, for the appellants.

*Charles J. M. Gwinn*, Attorney-General, for the appellee.

ROBINSON, J., delivered the opinion of the Court.

The appellants were indicted jointly for forging and uttering a certain endorsement on a bond of the Mayor and City Council of Baltimore, showing an indebtedness to one Frederick M. Ketchum, Jr., in the sum of \$18,400, redeemable on April 15th, 1900.

The indictment was framed under sec. 24, Art. 30, of the Code, which provides among other things, "that any person who shall falsely make or forge, or willingly aid or assist in falsely making or forging any bond or writing obligatory, or any endorsement or assignment of any bond or writing obligatory, with intention to defraud any person, or who shall utter or publish as true any such forged bond, writing obligatory or endorsement, shall be deemed to be a felon."

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To support the charge thus made in the indictment, the State offered in evidence the following instrument of writing: "No. 120—City of Baltimore—\$18,400, six per cent—City Hall stock:—

"This is to certify, that the corporation of the City of Baltimore, is indebted to Frederick M. Ketchum, Jr., in the sum of eighteen thousand four hundred dollars, redeemable on the fifteenth day of April, 1900, on the presentation and surrender of this certificate, with interest thereon in the meantime, at the rate of six *per centum per annum*, payable quarterly, on the first days of January, April, July and October, in each year, and is only transferable at the Mayor's office in person or by attorney, and on the delivery of this certificate to the transferee.

"Stamped on its face in blue ink: 1900. This certificate is issued in accordance with an ordinance of the Mayor and City Council, No. 37, approved April 15, 1870, and by a majority of the legal voters at the election held April 21st, 1870.

"In witness whereof, I, the Mayor of the City of Baltimore, have hereunto set my hand and affixed the seal of the said corporation, this ninth day of March, in the year of our Lord eighteen hundred and seventy-two.

"JOSHUA VANSANT, *Mayor*.

"Countersigned and registered by

JOHN A. ROBB, *Register*.

"Endorsed: Frederick M. Ketchum, Jr., July 19, 1876.

"Transfer to the Metropolitan Savings Bank of Baltimore.....\$10,000  
8,400

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"Frederick M. Ketchum, Jr.      \$18,400

"*Witness*: R. T. Jefferson.

Frederick M. Ketchum, Jr."

To the admissibility of this paper in evidence, the appellants objected on the ground that it is not a bond, and does not tend therefore to support the charge laid in the indictment. And this involves the inquiry as to what constitutes a bond? All the authorities agree that the law does not require any particular set form of words as essentially necessary to create a bond. As a general rule it may be said, that any instrument under seal, whereby the party from whom the security is intended to be taken, obliges himself to pay a certain sum of money at a day specified, will constitute a bond, 2 *Black. Com.*, 340, or as laid down by MATTHEW BACON, "any words which declare the intention of the party, and denote his being bound will be sufficient." Therefore, he says: "If a man useth this form of words, viz: *This bill witnesseth that I, A. B., have borrowed £10 of C. D., or thus, Memorandum, all things reckoned and accounted between A and B, A acknowledges himself indebted to B ten pounds;* all these forms are good, and shall effectually bind the party and his executors as if the most formal words were made use of, provided the writing be sealed and delivered." *Bacon's Abr. Obligations, (B.)*

Now if the paper offered in evidence is to be tested by these well settled principles of law it possesses, it must be admitted, all the essentials necessary to constitute a bond. By it, the corporation of Baltimore acknowledges itself indebted to Frederick M. Ketchum, Jr., in a certain sum, to wit, \$18,400, to be paid at a certain time, namely, the 15th day of April, 1900, and the obligation is signed by the Mayor, and sealed with the seal of the corporation.

In addition to this, it appears upon the face of the paper itself, to have been issued under the authority of Ordinance No. 37, of the Mayor and City Council of Baltimore, approved April 25th, 1870. This ordinance authorized the Register to issue bonds of the City of Baltimore, of the particular character of the instrument

of writing, upon which the endorsement was alleged to have been forged for the purpose of building the City Hall, and the ordinance was passed under the authority of the Act of 1870, chap. 363, which authorized the Mayor and City Council to issue bonds for that purpose.

It is clear, therefore, that the General Assembly and the Mayor and City Council intended to affix, and did affix the designation of bonds to the instrument of writing which they thus respectively authorized to be issued. And independent altogether of this, it is clear, that the paper is upon its face and by its terms a bond or obligation, such as is recognized by law.

The State then offered to prove, that the name of Frederick M. Ketchum, Jr., appearing on the back of said bond was not in the hand-writing of said Ketchum, and was not written on said paper by him or by his authority, and to the admissibility of the evidence thus offered, the appellants objected.

In support of this objection it is argued, that there can be no such endorsement or assignment of a bond within the meaning of the Code, unless the endorsement or assignment transfers to the holder the right to collect or receive the amount due on the bond, and that inasmuch as the bond in question was upon its face transferable only at the Mayor's office in person or by attorney, the endorsement of the name of Ketchum on the back thereof, was not an endorsement of the bond within the meaning of the statute. The argument if sound goes to the extent of maintaining that there could be no such a thing as the forgery of the endorsement or assignment of the bond in question, unless such forgery be in the nature of a power of attorney, because the bond was transferable only by power of attorney. And this too in the face of the statute, which punishes the forgery of an *endorsement* or an *assignment of a bond*, and in face too of the law, which declares, that any one who shall "*fraudulently* make any writing to

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the prejudice of another, shall be deemed guilty of forgery." 4 *Black. Com.*, 248; 2 *East's Crown Law*, 852; *R. vs. Reston*, L. R., 1 C. C., 200; *R. vs. Crocker*, 2 *Leach*, 987.

If the endorsement on the back of the bond set out in the indictment, was written by the appellants, with a *fraudulent intent*, and such endorsement operated to the prejudice of the rights of others, such an endorsement constitutes forgery within the statute. The provision in the bond in regard to the manner of its transfer, was for the protection of the city authorities. This was decided in *Gade's Case*, 2 *East C. L.*, 874, where the prisoner was indicted for forging a transfer of a share in the 3 per cents., and the objection was made in that case as in this, that the transfer was not *attested* as required by the printed transfers of the bank, but BULLER, J., in delivering the opinion of the Judges said, "that the entry and signature as stated in the indictment were a complete transfer without the attestation of witnesses, which was no part of the instrument, but only required by the bank for their own protection, *ex abundanti cautela*." There was no error therefore in the ruling of the Court in this exception.

The third and fourth exceptions present substantially the same question. After proving that the endorsement on the back of the bond was made without the authority of Ketchum, the obligee, the State proved that the appellants deposited said bond with the Metropolitan Savings Bank as collateral security for a loan of ten thousand dollars, and that at the instance of the bank, they went to the office of the City Register, and had the bond divided into two, one for ten thousand dollars which they sold to the bank, and one for *eight thousand and four hundred dollars*, which was found afterwards in the possession of the First National Bank, upon which was written also the endorsement of Ketchum. To prove that the endorse-



ment thereon was a forgery, the State offered in evidence the said bond of \$8400.

In the fourth exception the State proved that on or about the time of the forgery of the endorsement of the bond set out in the indictment, the appellants deposited with one Rosenberg, *another bond* of the City of Baltimore of like character, as collateral security for money loaned by Rosenberg to them. And to prove that the bond thus deposited with Rosenberg bore the name of Ketchum, the obligee, and that said name was forged, offered in evidence the bond itself.

The appellants were indicted not only for forging the endorsement of Ketchum on the bond set out in the indictment, but also for *uttering the same*, knowing it to be forged. To prove *guilty knowledge*, it was competent for the State to show that on or about the time of the forgery charged in the indictment, the appellants held and uttered similar forged instruments. *R. vs. Ball, R. & R.*, 132; *R. vs. Hough, R. & R.*, 120; *R. vs. Moore*, 1 *F. & F.*, 73; *R. vs. Salt*, 3 *F. & F.*, 834.

In *Whilly vs. Harris*, 2 *Leach*, 983, Lord ELLENBOROUGH said:

"This point is not new; it was reserved in *King vs. Tattersall*, which was tried before CHAMBRE, J., in Lancaster in 1801, and received the collective voices of all the Judges." So in *Rex vs. Hough, Russ. & R.*, 120, where the prisoner was indicted for forging and uttering with guilty knowledge, a bill of exchange purporting to be drawn upon a certain banking house, it was held that other forged bills on the same house, which were found upon the prisoner at the time of his arrest, were admissible to prove guilty knowledge.

Such evidence is not admitted for the purpose of proving such other offences, but simply to afford a reasonable presumption as to the guilty knowledge of the prisoner in regard to the offence of which he is charged.

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Jones and Anderson *vs.* Keating, *et al.*

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1 *Phillips on Evidence, Cowan, Hill and Edwards' notes*, 771.

Finding no error in the rulings below, they will be affirmed.

*Judgment affirmed, and  
case remanded.*

(Decided 16th December, 1880.)

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SAMUEL JONES and JAMES ANDERSON *vs.* THOMAS J.  
KEATING, ALLEN B. DAVIS, RICHARD T. WHITE,  
HENRY RENSHAW and SAMUEL R. WHITE.

*Acts of 1868, ch. 407, 1870, ch. 311 and 1872, ch. 377, relating to Public Education—Board of County School Commissioners, a Corporation—Suits should be brought in its Name—Injunction—Estoppel—Bill in behalf of Citizens.*

In 1869, J. was elected a member of the Board of County School Commissioners of Montgomery County, under the Act of 1868, ch. 407, and in 1872, 1874, 1876 and 1878, he was appointed a member of that Board by virtue of the Acts of 1870, ch. 311, and 1872, ch. 377, by the Judges of the Circuit Court for that County. He acted as president of the board for those years, till displaced by the appointment of some one else in his stead, as a member. A. was elected as the secretary, treasurer and examiner of the same board with J. in 1870, and appointed to that office in the same way and for the same years as J., and acted as such officer for those years, till displaced by the appointment of some one else in his stead. He never gave bond under his new appointments, but discharged the duties of the office. On a bill filed by J. and A. claiming to be respectively president, and secretary and examiner of the board, suing for themselves and in behalf of citizens of the county interested in the promotion of education, for an injunction against the board

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composed of the appellees appointed by the Judges in 1879, alleging the unconstitutionality of the Acts of 1870, ch. 311, and 1872, ch. 377, and claiming that the said J. and A. and the board elected in 1869, held over under the Act of 1868, ch. 407, it was HELD:

- 1st. That the Board of County School Commissioners being a corporation under the Acts relating to Public Education, suit could only be brought in its name.
- 2nd. That J. and A. were equally estopped from repudiating the authority and title under which they acted after their appointment under the Acts of 1870 and 1872, and from setting up independent and paramount titles to their offices by reason of their election in 1869.
- 3rd. That as parts of and as representing the community at large of the county, they were not entitled to the Court's interposition.

APPEAL from the Circuit Court for Anne Arundel County, in Equity.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., ALVEY, ROBINSON and IRVING, J.

*William H. Tuck*, for the appellants.

*J. Wirt Randall* and *Charles E. Phelps*, for the appellees.

*Charles J. M. Gwinn*, Attorney-General, for the appellees, by direction of the Governor of Maryland.

IRVING, J., delivered the opinion of the Court.

The appellant, Samuel Jones, claiming to be president of the board of County School Commissioners of Montgomery County, and James Anderson, claiming to be secretary and examiner of the board, suing for themselves, and in behalf of divers of the citizens of Mont-

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gomery County, interested in the promotion of education, by their bill charge that the complainants Samuel Jones, and four other persons, who are not joined as complainants, were, in November, 1869, elected School Commissioners of Montgomery County, that they qualified as such commissioners, and that the complainant Jones was elected by the board its president. It also charges that on January 4th, 1870, under the laws then in force, James Anderson, the other complainant, was elected the secretary, treasurer and examiner of the board, and qualified and bonded as such officer; and that they are respectively the rightful incumbents of those offices.

The bill charges, that a certain Allen B. Davis, Richard T. White and Henry Renshaw, of Montgomery County, now claim to be School Commissioners for Montgomery County, under an appointment made by the Circuit Judges of that county, on the 27th day of December, 1879; and that one Samuel R. White, claims to be secretary, treasurer and examiner, under the election and appointment of this pretended board of School Commissioners. The bill further charges, that the Acts of Assembly of 1870, ch. 311, and 1872, ch. 377, under which this pretended board of School Commissioners claim appointment and authority, are unconstitutional and void, and that their appointment of Samuel R. White, as secretary, treasurer and examiner was void, for the want of power in them to make such appointment.

The bill admits that the complainant, Samuel Jones, was appointed one of the County School Commissioners for Montgomery, by the Judges of the Circuit Court, in 1872, 1874, 1876 and 1878, successively, and that, under that appointment he acted as president of the board. It is also admitted, that the complainant, James Anderson, was in the same years appointed by this board, so appointed by the Judges, secretary, treasurer and examiner, and that he acted in that capacity for such board, but it is alleged

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that he never qualified or bonded under such new appointment; and that he always denied the right of the Judges to make the appointments, and contended that the law under which it was done was unconstitutional: and the complainants insist that they have not, by reason of having acted in their respective offices, as alleged, concluded themselves from denying the constitutional right of the Judges to make the appointments of School Commissioners.

The prayer of the bill is for injunction to restrain Allen B. Davis, Richard T. White and Henry Renshaw, from acting as School Commissioners, and Samuel R. White, from acting as school examiner, secretary and treasurer; and to prevent Thomas J. Keating, the comptroller of the treasury, from paying the moneys in the treasury due to Montgomery County for school purposes, to Samuel R. White, who claims to be treasurer and examiner. The Circuit Court for Anne Arundel County refused the injunction; and hence this appeal.

The theory of the complainants is, that the Acts of 1870, ch. 311, and 1872, ch. 377, are unconstitutional in so far as they devolved on the Judges of the Circuit Courts, in the several counties, the power of appointing the School Commissioners because the duty is extra-judicial, in no way pertaining to the office they fill under the Constitution, and because it is in conflict with the 8th section of the Declaration of Rights, of the Constitution of 1867; and further, that those Acts being void in the particular mentioned, because in contravention of the Constitution, the board of School Commissioners elected under the Act of 1868, and the school examiner, secretary and treasurer appointed by that board, still hold their respective offices; because under sub-chapter 2, sec. 1, of the Act of 1868, ch. 407, their tenure of office continued until their successors should qualify; and such successors they claim have not been appointed.

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It is urged on the part of the appellees, that these complainants are not the proper parties to institute this proceeding, and to have the question decided which they present. It is contended that the Board of School Commissioners is a corporation, and that assuming the Act of 1868 has not been successfully overthrown by the subsequent legislation, so far as the school commissioners elected under the provisions of that Act are concerned, still one member of that board cannot sue in this way, and for this purpose, but the board, the corporation, as it existed under the Act of 1868, as a whole must assert its rights in the premises.

This objection seems to be well taken, so far as the complainant, Samuel Jones is concerned. In *Green's Brice's Ultra Vires*, (2nd Am. Ed.,) 276, 277, this language is used "Not only can a corporation sue, but it is the proper party, and indeed the only party to bring actions in all cases where the ground of action is a matter affecting the corporation as a whole, and not some particular members or classes of members." The same doctrine is taught in *Angell and Ames on Corporations*, (8th Ed.,) sec. 370, and in *Bradley vs. Richardson*, 2 *Blatchford C. C. Rep.*, 345, 346, the Court declares that the true principle.

In *School Commissioners of Wicomico County vs. The School Commissioners of Worcester County*, 35 *Md.*, 201, this Court decided that although the Act of 1868, ch. 407, did not in terms incorporate the Boards of School Commissioners for the several counties, yet "all the property and funds of every sort, existing for the use and benefit of the public schools in the several counties, were transferred to and vested in such boards and their successors in office, and they were charged with the duty of administering and supervising the affairs of the public schools in their respective counties.

"They were, therefore, while not incorporated as legal entities in the full sense of the term, *quasi* corporations,

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with full power to sue and liable to be sued, in respect to all matters within the scope of their duties and obligations." The Act of 1870, did by express terms, incorporate all the several school boards then existing, and which succeeded them, and thereby the first board of which the complainant Jones was a member, became an incorporate body. He could not, therefore, represent the whole body in bringing a suit in his name. But independent of this view, he is estopped from claiming; he is not a member of the board which has been superseded by appointment of the Judges, of the board he attacks by this bill. He was appointed by the Judges of the Circuit Court for Montgomery County, (under the authority of the Acts which he now contends conferred no rightful power on the Judges,) in 1872, 1874, 1876 and 1878, and by the admissions of the bill, has acted as *President of the Board*, so appointed and constituted all the while, until his displacement by the appointment of some one in his stead. Having participated in the doings of the board constituted under the Acts of 1870 and 1872; having accepted appointment by the Judges as a member of the board; having accepted election by the board as its president, and having held himself out as the president of a legally constituted board of School Commissioners, he cannot now, and especially in a Court of equity, be allowed to repudiate the authority and title under which he acted, and set up an independent and paramount title to his office, by reason of his election in 1869. In the light of his conduct from 1870, onward to the time of the appointment of another person in his place, he must be held as having abandoned all claim to the place by reason of his election in 1869, and to have held only under the appointment of the Judges.

But the appellants insist, that notwithstanding the complainant Jones may not be *rectus in curia*, the same impediment does not stand in the way of James Anderson,

and that he, as the bonded officer, under the board elected under the Act of 1868, never having bonded afresh under his new appointments in 1872, and afterwards, must be regarded as still holding over under his original appointment, and now properly in Court. We cannot so regard him. His acts estop him from making such claim. He admits his appointment, by the several boards from 1872 onward, on their organization, as *their* secretary, treasurer and examiner, until the new board elected another person in his place. He admits having continued and acted as secretary and treasurer for these several boards. As such secretary he must have entered in their journal the record of his appointment from time to time. As their treasurer he honored their orders, and paid the bills they directed to be paid. He must have passed the moneys of the board to their credit, and kept his accounts accordingly, else the work of education with which they were entrusted would have remained unattended to in that county. All these are necessary inferences, fully warranted by the allegations of the bill. Under such circumstances, he must be held to have accepted the appointment as his own successor from time to time, and to use a phrase borrowed from the law of landlord and tenant, he must be held as having attorned to the new board in 1872, and from time to time afterwards. The fact that he gave no new bond, cannot affect the question whether he holds, since 1872, under the new system, or under the old board and appointment in 1869. He cannot avail himself of his own *laches*, nor of the negligence and *laches* of the several boards in not seeing to it, that such an officer was under proper bond for the discharge of his duty faithfully and honestly.

Could a Court of equity, under the circumstances presented by the admissions of the bill in this case, hold the securities of James Anderson, on his bond of 1869, liable for all that he might have done in violation of his trust under the boards of 1872, 1874, &c.? If he had committed



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default in his office under the appointment in 1876 and 1878, could a Court of justice hold the securities of 1869 bound for it, because of his secret impressions that the law under which the several boards which successively appointed him was unconstitutional? If not, and it would seem to be clearly contrary to reason and justice, that it should, then he did not hold over, but was his own successor in office, and the claim he now sets up cannot be regarded. Being in a Court of equity asking its interposition in their behalf, by the exercise of one of its extraordinary and summary powers, the right of the complainants to claim such interposition by the Court, cannot be too carefully scrutinized. In their official capacity, we find they have no standing in Court to maintain this suit. As parts of, and as representing the community at large of Montgomery County, they have made no case for the Court's interposition. In the *Wicomico County Case*, 35 *Md.*, 206, already referred to, this Court said, "the inhabitants of a county have no individual interest" in the money appropriated for school purposes in such County. *If a case could be made* at the instance of citizens, to restrain these defendants from receiving and disbursing the moneys appropriated to school purposes in Montgomery County, on the ground of fraudulent misapplication, and we do not intimate opinion thereon, no such charges are made as the bases of such interference.

The defendants are receiving the same public recognition as a legal Board of School Commissioners, and a legal treasurer and examiner, which was accorded to the complainants, under like appointment, under the same law which they now repudiate, as without constitutional warrant.

The Court below did right in refusing the injunction which was asked for.

We do not feel called on to enter into the discussion of the constitutional question. It is not necessary to the

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decision of this case, as presented; and we may fairly presume was not considered or passed upon by the Court below, as we find sufficient reasons for refusing the injunction, without supposing that question to have been considered. Without expressing any opinion upon the constitutional question, we shall affirm the order refusing the injunction, and dismiss the bill.

*Order affirmed with costs,  
and bill dismissed.*

(Decided 16th December, 1880.)

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THE WASHINGTON CITY AND POINT LOOKOUT RAILROAD COMPANY *vs.* THE SOUTHERN MARYLAND RAILROAD COMPANY, and others.

*Appeal—Receivers—Interlocutory Order of Sale—Code, Art. 5, sec. 21—Injunction.*

The discharge of a receiver furnishes no ground of appeal. Nor does the rescission of an interlocutory order of sale, which determined no right.

An appeal will lie, under Art. 5, sec. 21, of the Code, from an order directing a sale, but not from an order refusing to authorize a sale before final decree, or from an order suspending or rescinding an interlocutory order of sale.

Where one creditor cannot be injured by the dissolution of an injunction granted on the filing of a bill by creditors against a corporation, and its continuance would defeat the plans for the re-organization of the corporation entered into by the creditors, and would be inconsistent with previous orders in the cause, there is no equity that would justify the Court in maintaining the injunction at the sole instance of one creditor as against all the other creditors, as well as the corporation.

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APPEAL from the Circuit Court for Prince George's County, in Equity.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., MILLER, ALVEY, ROBINSON and IRVING, J., for the appellant and the appellees except the State, and submitted on brief by the Attorney-General for the State.

*R. B. B. Chew*, for the appellant.

*T. A. Lambert*, for the appellee, The Southern Maryland Railroad Company.

*C. J. M. Gwinn*, Attorney-General, for the appellee, the State of Maryland.

ALVEY, J., delivered the opinion of the Court.

The original bill in this case was filed by the appellant and others, claiming to be creditors of the Southern Maryland Railroad Company, against that company and others, praying the appointment of a receiver or receivers, the sale of the property of the Southern Maryland Railroad Company, and for an injunction. Receivers were appointed, and an injunction ordered and issued as prayed. All this occurred in July, 1875. The case has never been prosecuted to final hearing or decree; and the validity of the claim of the appellant is controverted, and has been put in issue by the pleadings in the cause.

The State of Maryland, being largely interested by reason of a subscription to the stock of the defendant railroad company, was allowed to intervene as a party to the proceedings. Subsequently, upon petition filed by the complainants, and by the State, an interlocutory order for the sale of all the property, real and personal,

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of the Southern Maryland Railroad Company was passed on the 18th of April, 1878, and by that order trustees were appointed to make the sale. This order was obtained under the provision of the Code, Art. 16, sec. 129; but it was never executed; and afterwards, application was made by the principal creditors, both as complainants and as defendants to the cause, representing that it was necessary, and for the mutual interest and good of all concerned, in view of, and in order to make effectual, a re-organization of the Southern Maryland Railroad Company, that the receivers should be discharged, the injunction dissolved, and the interlocutory order of sale rescinded. The State acquiesced in this application, as being the best thing that could be done under the circumstances of the case, and all the creditors of the Company, except the appellant, seem to have concurred in the propriety of the proceeding: or at any rate none other than the appellant opposed the application. The Court, after hearing the parties, by its order of the 23rd of May, 1879, accordingly discharged the receivers, dissolved the injunction, and rescinded the order of sale; but retained the bill of complaint for the benefit of the appellant, and such other creditors as may not have united in the application to the Court for the rescission of its previous orders, with liberty to proceed to establish their claims. There was tendered and accepted by the Court a good and sufficient bond for the payment of any amount that shall be adjudged to be due the appellant on final hearing. It is from this order of the 23rd of May, 1879, that the appellant has appealed, and, by express terms, the appeal is taken from the order only so far as it may affect the appellant alone. No other creditor, therefore, so far as the record discloses, makes any complaint of the order appealed from. And, upon careful consideration of all the circumstances of the case, this Court is clearly of opinion that the appellant has no good and substantial ground of appeal against that order.

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1. In the first place, the discharge of the receivers furnishes no ground of appeal. It is a settled principle that the appointment of a receiver determines no right, nor does it affect the title of either party in any manner whatever. The receiver is the mere officer of the Court, and his holding is the holding of the Court for the party who may be entitled. He is appointed on behalf and for the benefit of all concerned in the cause, and not of one party exclusively. And as the appointment determines no right as between the parties, but his holding is simply that of the Court, his discharge affords no ground of appeal to this Court. That has been settled by repeated decisions. *Ellicott vs. Warford*, 4 Md., 80; *Cain vs. Warford*, 7 Md., 282.

2. In the next place, we think it equally clear that the rescission of the interlocutory order of sale furnishes no ground of appeal. The order determined no right whatever. It did not establish the claims of the parties upon whose application it was passed; and the Court, in acting upon the application for such order, was in the exercise of a purely discretionary power. If it had refused to pass the order for sale, it is very clear that no appeal would have lain from such refusal; and having passed the order, if for satisfactory cause subsequently appearing, the order not having been executed, the Court deemed it proper to rescind that order, and thus leave the question of sale to depend upon the final determination of the cause, no person can rightfully complain by way of appeal. The power is one of no ordinary nature, and it should only be exercised in proper cases, where the Court has become "satisfied clearly by proof, that, at the final hearing of the case, a sale will be ordered." The object of the power is to prevent waste and depreciation of the property, and to promote the interest of all parties concerned; and where these objects are not to be attained, the power should not be exercised. And though the

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Court may have authorized the sale by interlocutory order, yet, where, as in this case, by change of circumstances, or arrangement among the parties interested, a sale is no longer desirable, or which may be detrimental to the interest, or operate to defeat the plans and agreements, of the parties having the greatest amount of interest in the property, it at once becomes the duty of the Court either to suspend the execution of the order of sale, or rescind the order entirely, as was done in this case. And from such order of suspension or rescission no appeal will lie. While an appeal will lie from an order directing the sale (*Code, Art. 5, sec. 21.*) the statute makes no provision for an appeal from an order refusing to authorize a sale before final decree, or from an order suspending or rescinding an interlocutory order of sale.

3. Lastly, as to the dissolution of the injunction granted on filing the original bill. It is quite manifest that the continuance of the injunction would have the effect to thwart and entirely defeat the plans and arrangements for the re-organization of the Southern Maryland Railroad Company; and consequently, its continuance would be wholly inconsistent with the objects and purposes of the order discharging the receivers and rescinding the order of sale. Moreover, the state of case upon which the injunction was granted, was wholly changed by the agreement and plan settled upon among the creditors for the re-organization of the company; and there is no equity that would justify the Court in maintaining the injunction at the sole instance of the appellant, as against all the other creditors, as well as against the railroad company. Nor can the appellant be injured by the dissolution of the injunction, whether the re-organization of the company be successful or not. The claim of the appellant is comparatively small, and the bill has been retained, with liberty to the appellant to proceed thereunder; and if it succeeds in establishing its claim, that is fully secured by

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the bond given for its ultimate payment, to say nothing of the property of the debtor company that may still remain liable for the payment of debts.

The order appealed from will be affirmed, with costs to the appellees.

*Order affirmed, and  
cause remanded.*

(Decided 16th December, 1880.)

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THE PENNSYLVANIA RAILROAD COMPANY IN MARYLAND *vs.* THE CONSOLIDATION COAL COMPANY and THE CUMBERLAND AND PENNSYLVANIA RAILROAD COMPANY.

*Construction of the Act of 1878, ch. 192—Injunction.*

Under the Act of 1878, ch. 192, entitled, an Act to enlarge the powers of the Pennsylvania Railroad Company in Maryland, the appellant had the power, upon complying with the requirements of that Act, to construct its road across the Potomac Wharf Branch of the Cumberland and Pennsylvania Railroad, on the west side of Wills' Creek, and then to cross over the creek to its east side. But as the appellant was not justified in making its crossing over the Potomac Wharf Branch forcibly, and against the consent of the appellees, without a written agreement between them conferring the easement on the appellant, which agreement was not executed, the appellees were entitled to an injunction restraining the appellant from using said crossing over the Potomac Wharf Branch.

APPEAL from the Circuit Court for Allegany County, in Equity.

The case is stated in the opinion of the Court.

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The cause was argued before BARTOL, C. J., BOWIE, MILLER and ROBINSON, J., and the decision was participated in by GRASON and IRVING, J.

*Frederick Williams* and *William Walsh*, for the appellant.

*J. H. Gordon*, *William F. Frick* and *I. Nevett Steele*, for the appellees.

BARTOL, C. J., delivered the opinion of the Court.

This is an appeal from an order of the Circuit Court for Allegany County in equity, continuing and making perpetual, an injunction which had been granted upon the bill of the appellees, restraining the appellant from using a crossing over the railroad of the appellees, known as the Potomac Wharf Branch of the Cumberland and Pennsylvania Railroad Company. The order of the Circuit Court was passed upon bill, answer, replication and proof.

The appeal was heard at the last term, and has been re-argued under the order of this Court. The several Acts of incorporation of the appellees, and their respective rights in the railroads and branches held and operated by them, are stated in the bill, these need not be particularly mentioned; but the roads of the appellees may be treated for the purposes of this case as belonging to the Cumberland and Pennsylvania Railroad Company; and will be spoken of as the Cumberland and Pennsylvania Railroad and its Potomac Wharf Branch. It appears from the record, that the Cumberland and Pennsylvania Railroad, has for a number of years been engaged in transporting coal from the State line opposite Piedmont, through the coal region of the George's Creek Valley to Cumberland, connecting by its main line with the Baltimore and Ohio Railroad, and thence with the basins of the Canal, and by its Potomac Wharf Branch with the Poto-



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mac River, and thence by water with the Canal. On the west of Cumberland is a narrow defile through Wills' Mountain called the *Narrows*, through which a stream flows called Wills' Creek. On the east side of this stream is located the Cumberland and Pennsylvania Railroad; and at the eastern end of the Narrows, its Potomac Wharf Branch defects in a south-western direction, crossing Wills' Creek and extending to the Potomac.

In 1876, the appellant company was chartered under the Act of 1870, ch. 476, and the amendment thereto of 1874, ch. 202; the *termini* of its proposed road as stated in the certificate were, "some convenient point in the City of Cumberland, Allegany County, State of Maryland, and some suitable or convenient point at or near Ellerslie, in the County and State aforesaid." It appears that Ellerslie is at or near the Pennsylvania line.

In constructing its railroad, the appellant encountered insuperable obstacles in entering Cumberland. The only approach to the city from the west, being through the Narrows, an attempt was made by the appellant to secure, by condemnation, a right of way on the east side of the creek through the Narrows, but the whole available space on that side having been condemned for the use of the Cumberland and Pennsylvania Railroad Company, this attempt was ineffectual; then it became necessary to cross the railroad of the appellees, and also the Potomac Wharf Branch, but doubts existed whether under its charter, and the provisions of the general Acts of 1870 and 1874, the appellant had the power to cross an existing railroad. Under these circumstances, the Act of 1878, ch. 192, was passed; and the construction of this Act, is the first and most important question to be considered.

It appears from the record, that this Act was the result of an agreement or arrangement between the railroad companies; it was drafted by the appellees' counsel, and assented to by the officers of the respective companies.

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Its object as stated in the title was "to enlarge the powers of the Pennsylvania Railroad Company in Maryland."

In the recital, after stating the incorporation of the appellant, for the purpose of constructing and operating a railroad from a point at the State line, near Ellerslie, to and within the City of Cumberland, and that the company is now ready to build said road into said city, with proper depot and terminal facilities for general freight and passenger traffic, and also to connect with the Chesapeake and Ohio Canal; the Act recites that "the only inlet for said railroad to said city or canal, is through the precipitous mountain gorge, near said city, known as the Narrows, through which the Cumberland and Pennsylvania Railroad is now operated on the east side of Wills' Creek." It then proceeds to enact:

"That in order to enable the said Pennsylvania Railroad Company in Maryland, to carry out the purposes for which it was organized, as stated in the foregoing preamble, the said company is hereby granted express authority to cross the tracks of the Cumberland and Pennsylvania Railroad at a point immediately west of the western entrance of the Narrows; (then prescribes particularly the manner of *such* crossing above the tracks,) and to cross the Potomac Wharf Branch of said Cumberland and Pennsylvania Railroad, and to cross the National road leading from the City of Cumberland, such last mentioned two crossings to be either at grade or by substantial bridging or trestling over the same, as may be determined by the president and directors of said Pennsylvania Railroad Company, as being most advisable to reach, either their depot or said canal." The Act then prescribes particularly in what manner the crossings shall be constructed if above grade, and the safeguards for the security and protection of the Cumberland and Pennsylvania Railroad

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Company, if the crossing of the Potomac Wharf Branch be at grade.

The Act then proceeds as follows: "And provided also, that after crossing the Cumberland and Pennsylvania Railroad, immediately west of the west end of the Narrows, the said Pennsylvania Railroad shall at that point cross to the west side of Wills' Creek, and proceeding on a line on the west side of said creek, shall not recross said creek before reaching a point at least four hundred feet south-east of the National road bridge over said creek, and shall cross the Potomac Wharf Branch of the Cumberland and Pennsylvania Railroad at the point where said branch intersects the said National road; and provided also that after recrossing Wills' Creek at the point above named, the line of the said Pennsylvania Railroad shall at no point infringe upon the line of condemnation, or right of way of the Cumberland and Pennsylvania Railroad, excepting at the point where it crosses the Potomac Wharf Branch of said road at its intersection with the said National road; *and provided also that said Pennsylvania Railroad after crossing Wills' Creek, west of the west end of the Narrows, shall have the option, instead of recrossing said creek at a point not less than four hundred feet south-east of the National road bridge, as above provided for, of remaining on the west side of said creek and crossing the Potomac Wharf Branch of the Cumberland and Pennsylvania Railroad, at any point on the west side of Wills' Creek, either above or at grade, as may be found most convenient and practicable; and the choice of either route herein above provided for shall be final;* and provided also, that if the said Pennsylvania Railroad Company shall elect to construct its railroad upon that line hereinbefore described, which provides for its recrossing Wills' Creek from the west side thereof at a point not less than four hundred feet south-east of the National road bridge; then and in that event, said Pennsylvania Railroad Company shall

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construct and is hereby required to construct from its main line aforesaid, a branch line on the east or west side of Wills' Creek to a point on the basins of the Chesapeake and Ohio Canal at Cumberland, or in lieu thereof, said company may contract with any existing railroad company leading to said basin or basins for the transportation of its cars thereto; said contract to be for a period of ninety-nine years, and renewable for a like period; and in crossing the Potomac Wharf Branch of the Cumberland and Pennsylvania Railroad, with the branch road aforesaid, said Pennsylvania Railroad Company shall have the same rights and be subject to the same conditions, regulations and limitations as are herein provided for the crossing of said Potomac Wharf Branch by the main line of said Pennsylvania Railroad Company."

Sec. 2. Provides for notice of the proposed places of crossing, and also whether the same are proposed to be made at grade or above grade, and also for the making of a contract therefor, and confers the right to condemn, in case no contract is made.

Sec. 3. Confers the right upon the Pennsylvania Railroad Company to cross the track or tracks of the Baltimore and Ohio Railroad Company.

The 4th and 5th sections are not material to be particularly noticed.

We have copied at length all the provisions of the Act applicable to the case, because in construing a statute, every part of it must be considered. The particular provision which has given rise to most dispute is that designating the routes of the Pennsylvania Railroad, giving to the appellant the option between the routes prescribed, and making that option final.

That part of the Act is printed in italics. On the 11th day of June, 1878, Mr. Healey, then president of the appellant, gave notice in writing to the vice-president of the appellee, that the Pennsylvania Railroad Company

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has decided to abandon the plan of recrossing Wills' Creek below the National road bridge, and notifying him that the Pennsylvania Railroad Company proposes at an early date to make a crossing at grade over the Potomac Wharf Branch, at a point designated in the notice on the west side of Wills' Creek, and offering to pay \$100 for the easement of said crossing in perpetuity. On the 16th day of August following, Mr. Mayer, President of the Cumberland and Pennsylvania Railroad Company, in a letter addressed to Mr. Williams, attorney of appellant, said, "the proposal for crossing" (the Potomac Wharf Branch at the east end of the Narrows,) "made to me by Mr. Healey in writing, and believed to be dated June 11th, 1878, has been accepted by me." The appellant proceeded to construct its road to the Potomac Wharf Branch on the west side of the creek, and some distance beyond, and located and was engaged in constructing its road across the creek to the east side thereof, some distance below; and considering it was entitled to make the crossing of Potomac Wharf Branch under and by virtue of a contract with the Cumberland and Pennsylvania Railroad Company, proceeded to make the crossing against the will of the latter company, and to restrain and prevent the appellant from using the crossing, the bill in this case was filed and the injunction granted.

We shall refer to the alleged contract hereafter, at present, we are considering only the construction of the Act of 1878. The contention on the part of the appellees is, that after exercising the option provided for in the Act, and electing to cross the Potomac Wharf Branch on the west side of the creek, it is bound to construct its road to its terminus entirely on the west side of the creek, and has no power or right to cross to the east side thereof. That the option given by the Act, is a choice between a line entirely on the east side of the creek and one on the west side, and having elected the latter, the election is by

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the terms of the law, final. This construction was adopted by the Circuit Court, and one of the grounds upon which the injunction was made perpetual, was that assuming the contract for the crossing existed, as the appellant contends, such contract was made with a view and purpose of pursuing the western side route, and constituted a part of that route; and that the unauthorized deflection from the line prescribed by the Act, deprived the appellant of the right to the crossing. On this point we think the learned Judge of the Circuit Court was in error. If the provisions of the law were observed, and a contract made as alleged, the appellant was entitled to cross the Potomac Wharf Branch at the point where the crossing was made. A departure from the statutory line afterwards, even if such departure was made, would give to the appellees no good cause of complaint, or any ground for maintaining the injunction. But we do not stop to discuss that point at length, because according to our construction of the Act of 1878, we think the appellant, after electing to cross the Potomac Wharf Branch on the west side of the creek, is not compelled to construct its road to its *terminus* on that side. The only routes designated and prescribed by the Act are to the places of crossing the Potomac Wharf Branch, on the east side or the west side of the creek. Beyond those points the Act is altogether silent, so far as respects any designation of route. It provides, that after crossing the Potomac Wharf Branch at its intersection with the National Road, it shall not infringe upon the line of condemnation or right of way of the Cumberland and Pennsylvania Railroad. This is the only thing said, with respect to its route after crossing the Potomac Wharf Branch on the east side of the creek. In the same manner there is no designation or prescription of the route beyond the crossing of the Potomac Wharf Branch on the west side of the creek, nor any thing in the law requiring the appellant

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to continue its route on the west side of the creek, after crossing the Potomac Wharf Branch, if it shall so elect, on that side. The error, it seems to us, into which the appellees have fallen is in construing the Act, as intending to prescribe the entire route of the appellant's road from its entrance into the Narrows to its *terminus*. There is nothing in the law to warrant this construction. The road was entitled to go to "some convenient point in the City of Cumberland." This is the *terminus* fixed by its charter, and recognized by the Act of 1878. That *terminus* might be on either side of Wills' Creek. The Act of 1878 was intended to enlarge the powers of the appellant, and ought not to be construed as limiting them, except such a construction be justified by the plain words of the Act, or by reasonable inference from its provisions. It was not necessary, looking to the circumstances under which the Act was passed, and to the views and objects of its projectors, that the road, after it had got through the Narrows, should be restricted to one side or the other of Wills' Creek. That is an inconsiderable stream, and is referred to in the law only as a geographical feature in the description of the route.

In considering the provisions of the Act, it seems to us that its main and leading purpose, was to confer upon the appellant the right to cross the railroads of the appellees, and to give to the latter full and complete protection of its right of way, and security at the crossings, so as to interfere as little as practicable with its business operations. Therefore, the Act provides that after crossing the appellees' road west of the west end of the Narrows, the appellant's road shall cross to the west side of the creek, and proceed on a line on that side, and not recross the creek till it reaches a point at least 400 feet below the National road bridge. When it reached that point, it would be below the Narrows and might recross to the east side without interfering with the right of way of

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the appellees except at the crossing. Then the Act provides, in effect, that if it recrosses the creek at that point, so as to make it necessary to cross the Potomac Wharf Branch on that side, the place of such crossing shall be at the intersection of that branch with the National road. There the designation of the route in the Act stops. Then the option is given instead of recrossing the creek at the point designated and crossing the Potomac Wharf Branch on the east side, to remain on the west side and cross the Potomac Wharf Branch at any convenient point on the west side. Here also, the designation of the route by the Act terminates. And it is provided that the "choice of either route herein above provided shall be final." The only routes herein above provided are to the crossing places of the Potomac Wharf Branch. It was not the purpose of the Act to prescribe any route beyond those points, that the appellant was free to determine under its charter.

The option given in the law is between crossing the the Potomac Wharf Branch on the east side, and crossing it on the west side of the creek. These are the material subjects provided for in the Act. The option of remaining on the west side and crossing the Potomac Wharf Branch on that side, is placed in antithesis to what goes before, viz., recrossing the creek and crossing the Potomac Wharf Branch on the east side. The word *remaining* in this connection, cannot, we think, be properly construed as requiring the road of the appellant to continue on the west side to its *terminus*; but to remain on that side until it has crossed the Potomac Wharf Branch. It was not necessary for the purposes of the law that the route beyond that point should be prescribed. In the circumstances existing at the time it was passed, so far as appears in the record, there was no reason whatever, looking to the interests of the public, or to the objects and purposes of the law, why the road should be required



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to remain on the west side of Wills' Creek until it reached its terminus.

It is not material to the question that after the passage of the Act, the officers of the appellant contemplated extending their road on the west side of the creek. Nor have we anything to do with the events which have since occurred, inducing the appellant to construct its road on the line now proposed, or with the motives of the appellees in opposing them.

The question here is a question of the powers of the appellant under its charter and under the law. By its charter and under the provisions of the Acts of 1870 and 1874, it would clearly have the power to recross Wills' Creek, to the east side below the Potomac Wharf Branch, and according to our construction of the Act of 1878, there is nothing in its provisions to restrain or limit its powers in this respect.

Some stress has been laid by the appellees in argument, upon that provision of the Act of 1878, requiring the appellant to construct a branch line to the canal on the east or west side of the creek. This obligation is imposed only in case the road shall cross to the east side of the creek, at the particular point designated in the Act, viz., "not less than 400 feet below the National road bridge, and shall cross the Potomac Wharf Branch at the place designated on that side; and it is argued that the appellant may escape this obligation by crossing the creek lower down. This objection it seems to us is not substantial, it by no means follows that the purpose declared in the Act, that the road of the appellant shall connect with the canal, could be defeated by recrossing the creek lower down. But it appears from the record, that the appellees' contention grows out of the fact, that the appellant is about constructing its road upon the east side of the creek, so as to reach and connect with the principal basins of the canal on that side.

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But the provision referred to, does not in our opinion aid or support the appellees in their construction of the Act. If the law fails to provide for the appellant's road connecting with the canal, except in the particular event or contingency named in the Act, it affords no reason why its provisions shall, in other respects, be construed to limit or restrict the powers of the appellant. There is no provision in the Act requiring the road to reach or connect with the canal, if constructed entirely on the west side of the creek.

After a most careful consideration of the Act of 1878, we are of opinion that the construction contended for by the appellees is erroneous.

With respect to the alleged contract under which the appellant claimed the right to make the crossing in question, we think after a careful examination of the testimony, that the appellant is in error, and that no such final and complete contract existed. After the notice of the 11th of June, 1878, before referred to, and the acceptance thereof in the letter of Mr. Mayer, it appears from the evidence, that the place of crossing as designated in the notice, was changed by mutual consent, and it further appears that it was also agreed and understood that a formal agreement in writing should be made conferring on the appellant the right to the easement, and specifying the manner in which it should be made and used, and securing to the appellees proper safeguards for their protection in the use of their road. This was a condition precedent to the completion of the contract. Such an agreement was made with respect to the crossing at the west end of the Narrows.

As to the crossing of the Potomac Wharf Branch, the agreement in writing was not made and signed by the parties.

A written agreement, Exhibit B, was prepared by the appellees; but the officers of the appellant objected to

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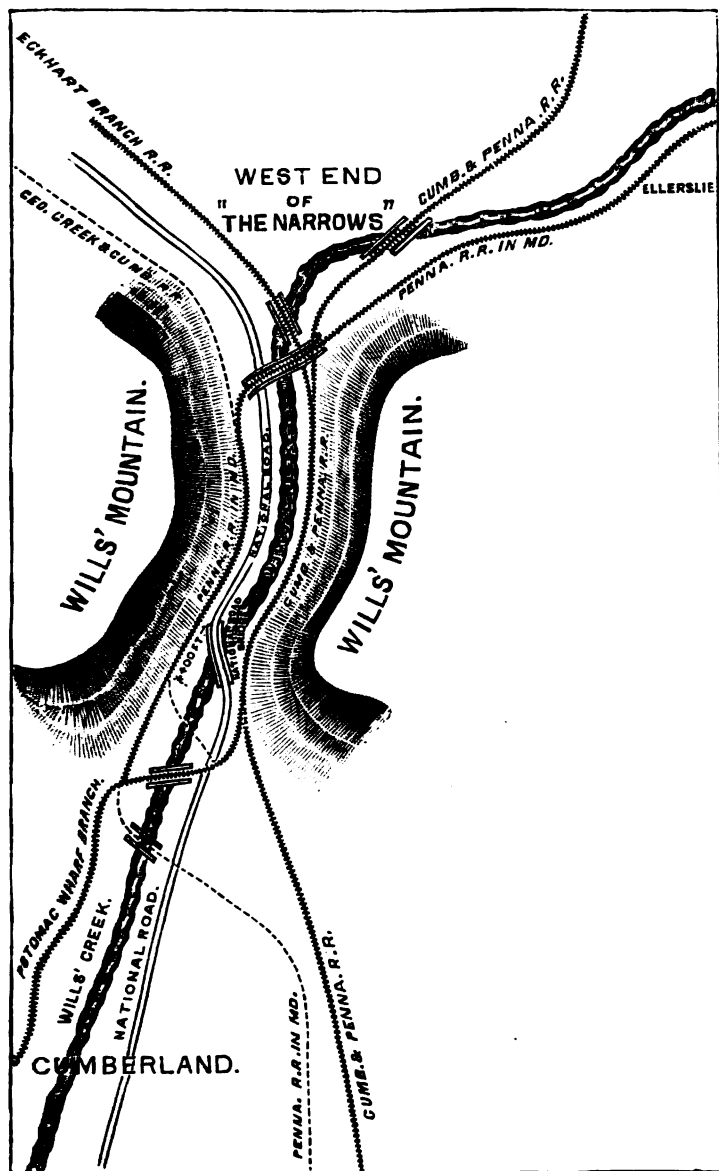
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some of its provisions, and were not willing to execute it. In that state of the case, it was the duty of the appellant to tender to the appellees a written agreement, expressing the terms of the contract as modified; and failing in obtaining the execution thereof by the appellees, its duty was to take legal steps to obtain its rights, or to resort to its right of condemnation under the Act of 1878. Without this, the appellant was not justified in making the crossing forcibly, and against the consent of the appellees, and for this reason, we think the order continuing the injunction was right, and ought to be affirmed.

*Order affirmed.*

(Decided 16th December, 1880.)

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MILLER, J., filed the following opinion, which was concurred in by BOWIE, J.:

The construction of the Act of 1878, ch. 192, seems to me to be in no wise essential to the decision of the present case, but as it has been elaborately and ably argued by counsel on both sides, it is proper the Judges who heard the oral arguments, as well as those who have since considered the printed briefs, should express their views of it. It is also important the question should be thus considered by the Judges of this Court, because there is other litigation in reference to the location of the appellant's road now pending and awaiting a settlement of the controversy over this statute. A wide difference of opinion as to its true construction exists both among the Judges of the Court below and of this Court. Having given to the subject the best consideration I can, and being unable, on this point, to concur in the opinion of the CHIEF JUDGE, which expresses that of a majority of the Judges of this Court who have as yet considered the question, I shall with great deference give my own views thereon in this opinion. These views, I am authorized to state, are concurred in by Judge BOWIE, who was one of the four Judges who alone heard the oral arguments.

Before coming to the language of the statute itself, it is all important to ascertain and bear constantly in mind the natural features and conformation of the locality to which it refers, the roads and improvements existing in the vicinity at the date of its passage, and the circumstances which gave rise to its enactment.

It appears then that Wills' Creek, a stream of considerable volume and breadth, flows through a mountain gorge near the City of Cumberland, called "The Narrows," and empties into the Potomac River, its mouth being within the city limits. The city itself is located to the eastward of this gorge, and has been built up on both sides of this stream, but the greater part of it lies on the east side thereof.

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The distance, following the creek, from the city limits to the Potomac, is not stated in the record, but from the plats of the locality exhibited to the Court in argument, I infer it does not exceed one mile. The old National turnpike road which was constructed many years ago, passes through the city on the east side of the creek until it reaches the eastern entrance to the Narrows, and there crosses the stream by a bridge and passes through the Narrows on its western side. The Cumberland and Pennsylvania Railroad having its terminus in that part of the city which lies east of the creek, had been located and constructed through the city and through the Narrows wholly on the east side of the creek, and did not cross to the west side until it had left for some distance the western entrance to the Narrows. This road which is practically owned by the Consolidation Coal Company, was chiefly used for the transportation of coal from the coal regions of Allegany County to the Baltimore and Ohio Railroad, and the Chesapeake and Ohio Canal. The Cumberland and Pennsylvania Railroad Company had also built or acquired possession of a short branch road called the "Potomac Wharf Branch," which diverges from their main road near the eastern end of the Narrows, and runs in a south-westerly direction across the National road and the creek, to a wharf on the canal basin or Potomac River, west of the creek. The Baltimore and Ohio Railroad also passes through the city, crossing the creek at a considerable distance to the eastward of the Narrows, and pursues its westward route along the left bank of the Potomac. The Chesapeake and Ohio Canal had also many years before been completed to Cumberland, and with basins and wharves for the shipment of coal, located some below and some above the mouth of Wills' Creek.

Such in the main, was the state of things, when in January, 1876, the appellant company was incorporated

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under the Act of 1870, ch. 476, known as the free railroad law. The corporate name they assumed was, "The Pennsylvania Railroad Company," and the *termini* for their road, for the construction of which they were incorporated, are, as expressed in their certificate of incorporation, (and which the law requires to be so expressed,) "Some convenient *point* in the City of Cumberland, and some suitable or convenient *point* near Ellerslie in Alleghany County." The Act in question is an *amendment* to this charter, passed to give the corporation enlarged powers, and to remove difficulties in order to enable it to locate and construct the main line of its road *between these termini*; and this fact must be carefully remembered when the various provisions, and the language of the Act itself come to be considered.

Now what powers had this company, and what could they do under their original charter? They could unquestionably select their Cumberland *terminus* at any point within the city limits they might think most convenient, but in making this selection, it was an absolute physical necessity that the point selected should be either in that part of the city which was on the east, or in that part which was on the west side of Wills' Creek. If then they should select a point on the east side, they could locate and construct their road, (if there were no rights of other roads presenting an insuperable barrier) through the city and through the Narrows wholly on the east side of the creek, or they could cross the creek before reaching the Narrows and pass through them on the west side of the creek. So if the selection were made on the west side, they could in like manner let the road remain wholly on that side of the creek, or cross it and pass the Narrows on its east side. In such case, these alternate routes, dependent upon an east or west side location of their Cumberland *terminus* are those which the natural features of the locality indicate as the most convenient

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and feasible, if not the only possible ones. Now let us suppose the company had first selected a Cumberland *terminus* and commenced the location of their road from that point, and had then found they had no power to cross "The Potomac Wharf Branch" road, and could not pass through the Narrows on the east side of the creek, because all the available space on that side had been condemned for the use of the Cumberland and Pennsylvania Railroad, so that they *were compelled to pass the Narrows on the west side of the creek*, and in that emergency they had applied to the Legislature for an Act to enable them to get *out of the city*, and through the Narrows *from east to west*. In such case, it is hardly possible to suppose they would, if they had selected an east side *terminus*, have asked for or accepted any law which would have required them, or have prescribed a route which would have compelled them to cross the branch road, and the creek at *more than one point*, or, if they had selected a west side *terminus*, that they would have asked for or accepted any law which would not have permitted their road to remain on the west side of the creek until it reached the west end of the Narrows. These considerations must also be borne in mind when we come to the provisions and language of the Act. The company however, did not select the Cumberland *terminus* first, and commence the location and construction of their road from that end. They commenced as they had the right to do, at the other *terminus* near Ellerslie, and located and built the road towards Cumberland, down and on the east side of the creek, until it reached the western entrance to the Narrows, and approached the tracks of the Cumberland and Pennsylvania Railroad. They then found they could not proceed through the Narrows on the east side of the creek without encroaching upon the right of way already condemned for the use of that road, and to do this it is conceded their charter gave them no power. But not



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only was their effort to make this encroachment successfully resisted, but their power to *cross* the tracks of this road was denied, and at this juncture they applied to the Legislature, and the Act of 1878 was passed. I do not propose to discuss the question whether the Act of 1870, as amended by that of 1876, ch. 242, gave to corporations which it authorized to be created, power to construct their roads *across* the tracks of existing railroads, because I do not regard it as material to the construction of this law, or to the decision of the present case. The appellant company applied to the Legislature for the passage of this Act and *accepted* it, when passed, as an *amendment* to their charter. They are therefore not only entitled to all the privileges it confers, but are bound by all the conditions which it imposes. It was conceded in argument that the law was drafted and most of its provisions agreed upon after consultation, and as the result of a mutual understanding between the officers and counsel of the appellant and the Cumberland and Pennsylvania Railroad Company. Having thus stated the main facts which show the circumstances under which the law was enacted, and the occasion of its passage, I come now in the light which they throw upon the question in dispute, to consider its language and provisions.

Its *title* is "an Act to enlarge the powers" of the appellant company, and its *preamble* recites: 1st. That this company had been incorporated and organized under the general laws of the State, for the purpose of constructing and operating a railroad from a point on the State line near Ellerslie, to and within the City of Cumberland, and that they are *now* ready to build their road *into* that city with proper *depot* and terminal facilities for general freight and passenger traffic, and also to *connect* with the Chesapeake and Ohio Canal; and 2nd. That the only inlet for their road to the *city* or *canal*, is through the precipitous mountain gorge known as "The Narrows,"

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through which the Cumberland and Pennsylvania Railroad is now operated on the east side of Wills' Creek. It is then in the first part of the first section enacted, that the company in order to carry out the purposes for which it was organized as stated in the preamble, shall have express authority to *cross* the tracks of the Cumberland and Pennsylvania Railroad, at a point immediately west of the western entrance of the Narrows above grade, *and* to cross the Potomac Wharf Branch of that road, *and* to cross the National road, the two last mentioned crossings to be either at or above grade, as may be determined upon by the company, as being most advisable to reach either their *depot* or the *canal*. If the sole purpose of the law had been to give the company power to *cross* these railroads and the National road, it would have stopped here, as the power of crossing is here given in the most ample terms, and nothing remained but to provide the usual safeguards in such cases. But this was not by any means the sole purpose of the makers or framers of this statute. The company had not at that time definitely selected a convenient point within the city limits for their depot and terminal facilities. That point could be selected under their original charter, and, as I have said, must of necessity be selected and located either on the east or on the west side of the creek. The framers of the law then saw it would be proper to prescribe two alternate *routes* for the road, one by which an east side, and one by which a west side terminus could be reached, and this was accomplished by the following provisions in the same first section of the Act:

"And provided also, that after crossing the Cumberland and Pennsylvania Railroad, immediately west of the west end of the Narrows, the said Pennsylvania Railroad shall at that point cross to the west side of Wills' Creek, and proceeding on the west side of said creek, shall not recross said creek before reaching a point at least four

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hundred feet south-east of the National road bridge over said creek, and shall cross the Potomac Wharf Branch of the Cumberland and Pennsylvania Railroad at the point where said branch intersects the said National road; and provided also, that *after* recrossing Wills' Creek at the point above named, the *line* of said Pennsylvania Railroad shall at *no point* infringe upon the line of condemnation or right of way of the Cumberland and Pennsylvania Railroad, excepting at the point where it crosses the Potomac Wharf Branch of said road at its intersection with said National road; and provided also, that said Pennsylvania Railroad after crossing Wills' Creek west of the west end of the Narrows, shall have the *option* instead of recrossing said creek at a point not less than four hundred feet south-east of the National road bridge, as above provided for, of *remaining* on the west side of said creek, *and* crossing the Potomac Wharf Branch of the Cumberland and Pennsylvania Railroad at any point on the west side of Wills' Creek, either above or at grade as may be found most convenient and practicable, and the *choice* of either *route* hereinabove provided for shall be final."

These clauses are cumbered with an excess of verbiage, but their meaning seems to me, not to be involved in any great obscurity. With deference to the differing opinions of others, it is plain to my mind, that by these provisions the Legislature has said to this company: "Your road shall cross Wills' Creek to its west side at the west end of the Narrows, and shall pass through the Narrows on that side, and shall remain on that side until it reaches a point at least four hundred feet south-east of the National road bridge, *then* if you select your terminus in that part of the city which lies on the east side of the creek, you shall cross the same to the east side at such a point as will enable you to cross the branch road at its intersection with the National road, and then your line or route to

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your terminus must keep clear of the limits of condemnation or right of way of the main line of the Cumberland and Pennsylvania Railroad which is located in that part of the city ; *but* if you select your terminus on the west side of the creek, then your road shall remain altogether on that side, and in that event you may cross the branch road at any point you may find most convenient and practicable to reach your terminus ; and you shall have the right to choose either of these *routes*, but your choice of either shall be final." That is my construction of these provisions. I cannot find in them a single word or passage which contemplates or allows a recrossing to the east side of the creek, at any other point than that which is specially designated. True, the *exact* point of recrossing is not defined, but the limit of four hundred feet and the obligation to cross the branch road at its intersection with the National road, place the point of crossing the creek within very narrow limits. If then the clause which contains the *option* were not in the law, it seems to me too plain to admit of doubt, that but one *route* would have been prescribed, and that this would of necessity have involved but this one crossing and the selection of an east side terminus ; for looking to the maps and diagrams of the locality which have been exhibited to the Court, I do not suppose any constructing engineer who was obliged to build the road across the creek to its east side at this point, would *ever dream* of taking it back again to the west side, and then again to the east side, (and do all this within the city limits, and within the built up portions thereof,) in order to reach an east side terminus, or that he would, after crossing at this point, select a west side terminus, which would involve a recrossing to the west side, and I am quite sure no such tortuous and expensive route, even if it were possible to pursue it, ever entered the minds of the framers of the Act or the officers and counsel of the two companies who

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agreed upon its provisions. In construing a statute like this, it is absolutely essential to apply its language to the locality and subject-matter with which it deals, and let these speak as interpreters where the meaning would otherwise be ambiguous, doubtful or obscure. If such then is the effect of the clauses which precede it, what is the office, and what was the object of the option clause? It seems to me plain that its purpose was to give the company the choice of another and an alternate route to reach a west side terminus, if they should not choose to select one on the east side. Here again the plats and diagrams indicate that the shortest, most practicable, if not the only feasible route to reach such a terminus, is for the road to remain on the west side of the creek, and so, in my judgment, the clause in express terms provides. It gives the "road" the "option instead of recrossing" the creek to its east side, at the place "above provided" for that purpose, "of *remaining* on the west side of said creek, *and* crossing the 'branch road' at any point on the west side of said creek, either above or at grade, as may be found most convenient and practicable." This language, as I read it, expresses in plain and unambiguous terms the purpose of the Legislature to *confine the road* to the west side of the creek, if it did not cross to the east side at the place previously designated. The right to cross this branch road having been previously granted, the crossing of it on the west side, is mentioned here merely as an incident or necessary consequence of the road's remaining on that side, and not as a point to be reached or an object to be accomplished *by* its so remaining. If the clause had read, "the said road shall have the option instead of recrossing said creek at a point not less than four hundred feet south-east of the National road bridge as above provided for, of remaining on the west side of said creek, and the choice of either route hereinabove provided for, shall be final," no one could doubt what the routes were, or

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that by one of them the road would be confined entirely to the west side of the creek. And yet the omitted words "and crossing the Potomac Wharf Branch of the Cumberland and Pennsylvania Railroad at any point on the west side of Wills' Creek, as may be found most convenient and practicable," give no additional *power* or *privilege* to the company, and I cannot see how the insertion of such mere surplus verbiage can have any material bearing upon the construction and effect of the clause. Shortly stated, the meaning of these several clauses as I read and construe them, is that the road shall *either* cross the creek to its east side at the designated place, *or* shall remain on its west side.

The principal argument in opposition to this construction, is to the effect that it was the sole purpose of all these clauses to prescribe two alternate places for crossing the branch road, and the two *routes* spoken of are simply routes to reach these two places. In other words that one route commences (after the road passes the Narrows) at the point of divergence, rendered necessary in order to reach the place where the branch road intersects the National road and *ends* at this intersection, and the other commencing from the same point of divergence extends to the branch road on the west side and *ends there*, so that after crossing the branch road on the west side, the road could thereafter cross to the east side, wherever the company might choose to locate such crossing, and by that route reach an east side terminus. But this construction, with great deference to the able counsel who have urged it with so much emphasis and ingenuity, appears to me to be wholly untenable. In the first place it renders unnecessary a large part of these provisions. In the former part of the section, the right to cross this branch road, either at or above grade is unconditionally granted, and the road is then taken through the Narrows on the west side of the creek to a point where all necessity of

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interference with the main line of the Cumberland and Pennsylvania Road was removed. Why then if the construction contended for be correct did not the law stop here? The right of crossing this branch road where they pleased, and as they pleased, was fully secured to the company, and they only desired to, and could in fact cross it but once with their main line. By stopping here, the law gave them the undoubted right to do just what in fact they have since done, that is to cross the branch road on the west side of the creek first, and then cross the creek to its east side, and build their road by this route towards an east side terminus. I am, therefore, unable to perceive why this company should have asked, or the other company have desired the Legislature to prescribe two alternate crossings of the branch road, and above all, to designate specially a place for crossing the creek and the branch road on its east side, if such crossing was to have no reference to a route by which an east side terminus was to be reached. Again the construction contended for dwarfs the significance of the term "route," as applied to the locality and subject-matter referred to, by confining it to the very short space between the point of divergence and the branch road; but more than all it requires the words "remaining on the west side of said creek *and* crossing the branch road," to be either stricken out of the statute, or to be read as meaning that the road is required to remain on that side *only until* it crosses this branch, and then it may go on either side of the creek wherever the company may choose its location. If the law means this, then, in my judgment, the law-makers have used terms which in their ordinary acceptance, as applied to the subject-matter of which they were speaking, express the very opposite idea. If they had meant this I am sure they would have employed no such language, and I cannot place any such construction upon it.

But the construction I have placed on these clauses, though it may well rest on what has already been said,

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seems further to be strengthened and confirmed by the following clause also in the same section, and which is in these words:

“And provided also that if said Pennsylvania Railroad Company shall *elect* to construct its railroad upon *that line* herein before described, which provides for its recrossing Wills' Creek, from the west side thereof at a point not less than four hundred feet south-east of the National road bridge, *then and in that event*, said Pennsylvania Railroad Company *shall construct*, and is hereby *required* to construct from its *main line aforesaid*, a branch line on the *east or west side* of Wills' Creek, to a point on the basins of the Chesapeake and Ohio Canal at Cumberland, *or in lieu thereof*, said company may contract with any existing railroad company leading to said basin or basins for the transportation of its cars thereto, said contract to be for a period of ninety-nine years, and renewable for a like period, and in crossing the Potomac Wharf Branch of the Cumberland and Pennsylvania Railroad, with the branch road aforesaid, said Pennsylvania Railroad Company shall have the same *rights* and be subject to the same conditions, regulations and limitations as are herein provided for the crossing of said Potomac Wharf Branch by the main line of said Pennsylvania Railroad Company.”

The obvious purpose of this provision, is to secure a connection of this road with the canal, in pursuance of a long continued and well settled policy of the State, to have such connections made by all railroads constructed in that locality. Its requirements are plain and explicit. If the *main line* of the appellant's road should recross the creek to the east side at the place designated, and the company should elect to take *that route*, then they are required to build a branch line to the canal, on the east side of the creek, if the starting point is from the main line on that side, and on the west side, if the starting



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point be from the main line on that side; and power to cross the Potomac Wharf Branch road with this *branch line* which had not before been given is granted in express terms. Without doubt, this provision was considered by the Legislature as an important feature of the law, a requirement which they did not intend should be evaded, or become nugatory or useless. But by its terms, the obligation to construct this branch line, or make the contract provided for, is imposed *only in the event* the company should elect to build their main road upon the *line* that conducts it across the creek at the designated point, and it is hardly possible to conceive that the law-makers would have been thus specific as to this condition, if they had not supposed they had provided *this* as the *only place* at which the main road could recross, and this as the *only route* by which an east side terminus could be reached. It would have been folly to exact the construction of this branch line, only in this event, if the previous clauses gave the right to recross the creek at any other place lower down, by the adoption of which the company would be released from the obligation to build any branch to or make any connection with the canal.

Finally such was the construction placed upon the Act by the company itself, before it passed into the control of its present managers. After the road had been located and partly constructed through the Narrows down to the four hundred feet point, it became necessary for the company to exercise the *option* provided by the law, and this was done, as is very clearly shown by the letter of the 11th of June, 1878, written by Mr. Healey, *its then* President, to the Vice-President of the Cumberland and Pennsylvania Railroad Company. In this letter, Mr. Healey says: "The Pennsylvania Railroad Company, (in Maryland,) has decided to *abandon* the plan of recrossing Wills' Creek, below the National road bridge," and he then notifies the Cumberland and Pennsylvania Company, that it

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is the purpose of his company, at an early date, to make a crossing at grade over the Potomac Wharf Branch at a designated point on the west side of the creek. It is plain that before and at the time this letter was written, the officers of this company had no idea that if they *abandoned* the plan of recrossing the creek at the point stated they could afterwards cross it at any other point, for the testimony in the record very clearly shows that at that time it was their *intention* to locate and construct their road *entirely on the west side*, down to Washington street and Henderson's basin, which is immediately connected with the canal, and to make the terminus of their road at that place. They had in fact then located and were taking steps to condemn the greater part of this route. The plan of crossing at the point now selected and used for that purpose was evidently an afterthought, a plan devised and adopted by the present managers of the company in order to avoid the effect of the *election* made by their predecessors. But the company having once made the election which the law provides, the choice became *final*, and if this construction of the statute is correct, then in crossing to the east side at the place where it is admitted they have so crossed, they are pursuing a route not only not authorized but forbidden by their charter.

I come now to the questions involved in the present case. The injunction which was granted on the 18th of August, 1879, upon the bill filed by the appellees, restrains and forbids the appellants from using a crossing of the Potomac Wharf Branch Road on the west side of the creek which they had put in at a particular point by violence and against the consent of the complainants. It is not necessary to examine the averments of the bill in order to ascertain whether the injunction was rightfully granted in the first instance or not, because the case is now before this Court upon appeal from an order continuing the injunction passed after answers had been filed

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and a large amount of testimony taken, and the question therefore is whether this latter order is correct upon the state of case made out by this proof.

It appears to have been the purpose of the original corporators and organizers of this company to construct a road for general freight and passenger traffic between Cumberland and the State line, where it would connect with the Pennsylvania system of railways. As originally designed it would not reach the coal regions, and would not therefore become a competitor in the transportation of coal with the roads of the appellees. But in May, 1879, parties interested in building a new road, called the Georges' Creek and Cumberland Railroad, which extends to the coal regions and is designed to be a coal-carrying road, obtained a controlling interest in the appellant company by purchase of its stock, and subsequently put out the old and put in a new Board of Directors, and then sought to connect this new road with the appellant's road at the west end of the Narrows, so as to carry its coal over the latter road into Cumberland. This made the appellant's road, or at least this part of it, a direct competitor and rival in business with the Cumberland and Pennsylvania Railroad, and therefrom and thereafter opposition to its construction arose on the part of the appellees. But with this competition and rivalry Courts of justice have nothing to do. They are not the guardians or protectors of the mere business interests of either of these companies, nor indeed of any other corporation. It is solely with the property and legal rights of these contesting companies that this Court has now to deal, and in this respect each of them stands and is entitled to stand before a judicial tribunal upon precisely the same footing as the other.

I have no doubt as to the right of the appellant to cross the Potomac Wharf Branch Road at the point in question, provided it has acquired that right by due con-

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demnation of the easement or by contract, for a crossing at this point is strictly within the line of the authorized west side route. It did not proceed to condemn, and the question is, has it acquired the right by contract? But assuming it had acquired the right in either mode, it is insisted:

*First.*—That as the appellant has, after making this crossing, pursued or intended to pursue a route not authorized by the Act of 1878, it has committed or is about to commit a fraud upon the law, and can be restrained in so doing at the instance of the appellees. But in my opinion the appellees are not made the vindicators of the law in this respect, and have no right to complain. If the appellant has lawfully pursued a prescribed and authorized route down to and including this crossing, it is no concern of the appellees whether that route is *thereafter* followed or not. There may be some show of authority for the position taken by the appellees, but the better considered and now well established principle goes at least to this extent, that a land-owner cannot restrain a corporation in the exercise of its powers of condemning his land for the use of its road, on the ground that a *subsequent* material variation from the prescribed route is being made or intended to be made, provided that in *coming to and passing through* his land, it is on its lawful route, and acting within the limits of its charter. *Kerr on Injunctions*, 300, 301; *Newton vs. Agricultural Branch Railroad Corporation*, 15 *Gray*, 27. But it is further contended:

*Secondly.*—That having acquired the crossing for the purposes of its road as originally designed, and to accommodate the traffic of such a road, it is not competent for the appellant now to devote it to the purposes of another road which will require a larger and more frequent use of the easement, and consequently subject the appellees to greater inconvenience and trouble. There is much more force and reason in this position, and I think

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that, under the circumstances of this case, it must, at least, have the effect of throwing upon the appellant the *onus* of showing by clear and satisfactory proof that it had, at the time the crossing was put in, a valid, subsisting and perfected contract with the appellees authorizing it to make it. The remaining question therefore is, does the proof show the existence of such a contract?

It is supposed that such a contract is contained in, and evidenced by two letters, the first being that of Mr. Healey already referred to, of the 11th of June, 1878, and the other a letter dated the 16th of August following, from Mr. Mayer, the President of the Cumberland and Pennsylvania Railroad Company, to Mr. Williams, the counsel and attorney of the appellant. In the first letter, Mr. Healey, after stating the abandonment of the plan of re-crossing Wills' Creek below the National road bridge, proceeds to give notice, in accordance with the terms of the Act of 1878, that his company proposes at an early date to make a crossing at grade over the Potomac Wharf Branch, at a specified point on the west side of the creek, and says that his company "hereby offers the Cumberland and Pennsylvania Railroad Company one hundred dollars for the easement of said crossing in perpetuity." He requests an answer to this proposition within ten days, and encloses a tracing describing the proposed crossing. An interval of more than two months elapsed before the letter of Mr. Mayer was written. In the meantime negotiations had been going on between the two companies in reference to the crossings at the west end of the Narrows which resulted in an agreement bearing date the 20th of June, 1878. This agreement specifies the mode in which these crossings should be made, that the sum of \$1000 should be paid therefor, and that a formal agreement or deed embodying the details, should be executed, accompanied by a map or plat indicating and describing the same with more certainty. On the 9th of August, a

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formal deed prepared in duplicate, to be executed by both companies, and *granting* in formal terms the easement of these west end crossings was executed by Mr. Mayer under the seal of his company, and on the 14th or 15th of the same month was in like manner executed by the Vice-President of the appellant, and annexed thereto was a map or plat in which the points and manner of the crossings were indicated. Previous to this time, Mr. Healey had verbally mentioned to Mr. Mayer, a slight change in the place of crossing the Potomac Wharf Branch, from that designated in his letter of the 11th of June, and this change of location was verbally accepted by the latter. On the 16th of August, the formal duplicate deeds for the west end crossings were interchanged and delivered, and on that day the sum of \$1000 was paid to Mr. Mayer by Mr. Williams in behalf of Mr. Healey who was then absent from Cumberland. A misunderstanding had arisen before this payment was made, as to whether this sum included payment for the crossing of the Potomac Wharf Branch, Mr. Mayer insisting that it did not, and Mr. Williams that it did. The check which Mr. Healey had left for the money so stated, and Mr. Mayer refused to receive it. At this interview and at the request of Mr. Williams, the letter of the 16th of August, 1878, was written by Mr. Mayer, and is as follows: "My Dear Sir: The one thousand dollars received by me this day in payment of the easement of crossing as described in a deed executed by me, August 9th, 1878, in the City of Baltimore to the Pennsylvania Railroad Company in Maryland, has nothing to do with the crossing of the Potomac Branch at grade, at the east end of the Narrows, which matter is to be hereafter settled between myself and Mr. Healey. The proposal for such crossing made to me by Mr. Healey in writing, believed to be dated June 11th, 1878, has been accepted by me."

No violence is done to the language of this letter by reading the last clause of it as referring exclusively to the

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*price* to be paid for the crossing and as an acceptance of the offer to pay \$100 therefor. It does not appear to have been written for the purpose of accepting Healey's proposal so as to make an unconditional and completed contract under which the crossing could be put in without anything further being done between the parties, for, as I read it, it speaks of the crossing of the Potomac Branch at the east end of the Narrows as a *matter* to be *thereafter* settled between the writer and Mr. Healey. The least however that can be said of it is that it presents such a case of ambiguity as to allow preceding, attendant, and subsequent events and circumstances to be looked at by the Court for the purpose of arriving at its true meaning and construction. The record is full of testimony on this subject and it would extend this opinion beyond all reasonable limits to set out the facts in detail, or even to give an abridged narrative of them. I have examined the testimony very carefully, and though on some points there is conflict between witnesses, I am satisfied, more especially from the documentary proof consisting of letters, telegrams and written papers referring to the subject, that these two letters do not, and were not intended to embody or constitute such a completed contract as I have said it was necessary for the appellant to prove. Apart from everything else bearing on the question, I think the testimony clearly shows that up to a short time before the crossing was put in, and certainly up to the time when the control of this company passed into the hands of its present owners, it was well understood by the Presidents and other officers of both companies, that before the crossing should be, or could be put in, a formal agreement or deed granting the right, and embodying the terms and conditions under which the crossing should be conducted and used, similar to that under which the west end crossings had been permitted and effected, should be prepared and executed by both companies; and that the execution of

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such an agreement or deed was to be a condition precedent to the acquisition of any right to the easement by contract. No such agreement was ever so executed. One was prepared and executed by the appellees in September, 1878, but its terms and conditions were not acceptable to the new president of the appellant, and he refused to sign it. It matters not what were the grounds of such refusal, for if he could not obtain a modification of these conditions, or if the two companies could not agree as to the terms to be embodied in the agreement, then the attempt to acquire the crossing by contract fell through, and it became the right and duty of the appellant to exercise the power of condemnation which its charter gave it in the most ample terms. This unquestionably lawful course it did not pursue, but proceeded to construct the crossing forcibly and despite the protest and resistance of the appellees. This was an unlawful invasion of the right of property for which an injunction is the proper remedy. The appellees stand in the same position as any land-owner over whose land a railroad company is proceeding to construct its road without lawful right, and the authorities are clear that in such case a Court of equity has jurisdiction to prevent the wrong. In my judgment therefore the order continuing this injunction should be affirmed.



JOHN W. CRISFIELD vs. THE STATE OF MARYLAND,  
at the instance and for the use of HENRIETTA M.  
HANDY, use of MARY E. HANDY, use of LEVIN  
WOOLFORD.

*Liability of a Bankrupt for a Debt due by him as Executor—  
Fiduciary Debts—Remedy of a Surety on such Executor's  
Bond against whom judgment has been obtained and paid, by  
Action of Indebitatus Assumpsit against the Principal  
Debtor—Remedy on the Bond in Equity—Construction of  
the U. S. Bankrupt Act, and of Art. 9 of the Code.*

Suit was brought on the bond of C., as executor of H., to recover an amount claimed to be due the equitable plaintiff as legatee under H's will. Shortly after suit brought, C. was adjudged a bankrupt, and among other claims proved against the estate was that sued on. Subsequently the Court below directed a stay as against C. pending the proceedings in bankruptcy. The suit was entered to the use of M. E. H., and judgment recovered against the sureties on the bond. The amount recovered was paid by W., one of the sureties, and the equitable plaintiff's assignee assigned the judgment and cause of action to W. On motion of the plaintiff the suit was brought forward and the stay as to C. stricken out. Pleas were filed by C., to some of which the plaintiff demurred, and upon others issues were joined. **HELD:**

- 1st. That C's discharge in bankruptcy did not release him from liability for the debt due by him as executor to the equitable plaintiff as legatee.
- 2nd. That neither at common law nor under Art. 9 of the Code, could W. maintain an action on the bond against C. to recover the money paid by him, as the payment operated at law as an extinguishment of the bond; that his remedy at law was an action of *indebitatus assumpsit* against B. for money paid to his use.
- 3rd. That in equity the payment by W. did not operate as a satisfaction or extinguishment of the bond, and that by such payment W. was entitled in equity to be subrogated to all the rights and remedies and securities which the plaintiff as creditor held against C.

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The fact that money due to a *cestui que trust* is allowed to remain in a trustee's hands with the consent of the *cestui que trust*, does not change the nature of the debt itself. It still remains a debt due by the trustee in his character as trustee.

APPEAL from the Circuit Court for Somerset County.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., MILLER, ALVEY and ROBINSON, J.

*Henry Page* and *William H. Tuck*, for the appellant.

*John H. Handy*, for the appellee.

ROBINSON, J., delivered the opinion of the Court.

This is a suit on the bond of John W. Crisfield, executor of Samuel K. Handy, to recover a sum of money claimed to be due the equitable plaintiff, as residuary legatee under the will of the testator.

A few days after the institution of the suit, the defendant, Crisfield, was adjudicated a bankrupt, and among other claims proved against the bankrupt estate, was that set forth in the breach assigned in plaintiff's declaration.

Subsequently, the Court of its own motion directed a stay of proceedings as against the bankrupt, now the appellant in this case.

The suit was afterwards entered to the use of Mary E. Handy, and judgment was recovered against Levin Woolford and William W. Wise, *sureties on the bond of the appellant as executor*, for \$2561.79.

The amount thus recovered by the judgment was subsequently paid by Woolford as surety, and the assignee of the equitable plaintiff assigned the judgment and cause

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of action to the said Woolford, and directed the clerk of the Court to make entry of same.

On motion of the plaintiff the Court directed the suit to be brought forward, and the stay theretofore entered as to Crisfield to be stricken out.

Sundry pleas were then filed by the defendant, to some of which the plaintiff demurred, and upon others issues were joined. The cause was tried before the Court and judgment was recovered for \$4003.21.

In the view we take of this case, the only questions necessary to be considered are:—

1st. Whether the appellant's *discharge in bankruptcy* releases him from liability for a debt due by him *as executor to the equitable plaintiff as legatee?*

2nd. If not, whether upon the payment of said debt by Woolford, a surety on the executor's bond, he can maintain *an action at law on the bond* against Crisfield, the principal, to recover the money thus paid?

The first question depends upon the construction of sec. 33 of the Bankrupt Act, which provides: "that no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character shall be discharged, but the debt may be proved, and the dividend thereon shall be a payment on account of such debt."

Is then the debt due by the appellant as executor to the equitable plaintiff as legatee, a *fiduciary debt*? And this seems to us too plain for contention. A fiduciary debt is one founded or arising upon some confidence or trust as distinguished from a debt founded simply upon contract. And an executor is one to whom is confided by last will and testament the personal estate of the testator, to be held and administered by him in pursuance of the will of the testator and the rights of all parties in interest. If a trustee in the broadest meaning of that term, is a person in whom some estate, interest or power affecting property,

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is vested to be *held, used or exercised for the benefit of another*, then the office of an executor is to all intents and purposes a trust, to be held and exercised by him for the benefit of creditors, legatees, and parties entitled to distribution. And for the proper administration of the trust he always has been held amenable alike to Courts of law and equity.

In the Bankrupt Act of 1841, debts due by executors were in express terms recognized as fiduciary debts, the language of the Act excepting such debts from the operation of law being, "All persons owing debts created in consequence of defalcation as a public officer or as executor, administrator, guardian, or trustee, or while acting in *any other fiduciary capacity*."

It was unnecessary to enumerate specifically such debts in the Act of 1867, because they had both by legislative and judicial construction received a fixed and determinate meaning. The debt due by Crisfield, executor, was therefore in our opinion a fiduciary debt, from the payment of which he was not released by his discharge in bankruptcy.

Nor does it seem to us that the facts set forth in the appellant's eighth plea, in any manner change the nature or character of the debt. This plea alleges that the appellant offered and was ready to pay the debt due the plaintiff, but that at her instance and request, it remained in his hands with the understanding, he was to pay to her interest on the same and such parts of the principal as might be necessary for her support, and the residue upon reasonable notice. This plea is not set up by the sureties on the bond, but by the executor himself. The fact that money due to a *cestui que trust* is allowed to remain in the hands of a trustee with the consent of the *cestui que trust*, does not change the nature of the debt itself. It still remains a debt due by the trustee in his character as trustee.

We come now to the second question. The original suit was brought on the joint and several bond of *Crisfield*

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*the appellant, Woolford and Wise.* Judgment was recovered against Woolford and Wise, and further proceedings were stayed as to Crisfield pending the proceedings in bankruptcy. The judgment was subsequently paid by Woolford, one of the sureties, and the question now is, whether he can maintain an *action at law on the bond* against Crisfield the principal, to recover the money thus paid by him.

And here we are met with the well settled principle of the common law, that the payment by a surety of a debt due on a joint and several bond, is a satisfaction, or as expressed in some of the cases an extinguishment of the bond, and that no action can be maintained on the bond for the recovery of the money thus paid.

The remedy of the surety in such cases, is an action of *indebitatus assumpsit* against the principal, to recover the entire amount paid, or against the co-sureties for contribution. *Carroll vs. Bowie*, 7 Gill, 38.

If this be so, then it is clear that no action will lie *at law on the bond*, at the instance of Woolford the surety against Crisfield the principal, unless this case comes within the provisions of Art. 9 of the Code.

The first section it is true, provided that the assignee of any bond or *chose in action*, for the payment of money, or any legacy may maintain an action in his own name against the debtor, in the same manner as the assignor might have done before the assignment.

This section is a codification of the Act of 1829, ch. 51, and was passed to enable assignees in such cases, to sue in their names, but it has no reference to a case like the one before us, in which the assignee is a *joint debtor*, and in which the payment was made not in the character of *purchaser* of the bond or legacy, *but as surety*. Under such circumstances how can the appellee maintain an action on the bond in the same manner as the plaintiff the assignor? In the first place, Woolford is one of the obligors, and he

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cannot of course sue himself. Then again, Wise, another party to the bond, is a co-obligor, and both Wise and himself are in fact sureties, and the appellant is the principal. The equitable plaintiff could proceed and recover judgment against all the parties to the bond, Woolford as assignee, could not under any circumstances recover of Wise a co-surety more than his contributory part, and he could not therefore maintain an action in his own name as the assignor might have done before the assignment.

From the above tenor and purpose of the section it is obvious that it does not contemplate or authorize assignments between parties to the same bond, but only intends to authorize strangers to the debt to recover on such assignments, and by virtue thereof to sue in their own names, as a matter of convenience.

The only section in this Article it seems to us, upon which an argument can be based, in support of the appellees' contention is the fifth, which provides, "That the surety on any bond or other obligation for the payment of money or promissory note, or the endorser of any protested bill of exchange, who shall pay or tender the money due thereon, whether the whole be due or part has been previously paid, shall be entitled to an assignment thereof, and may by virtue of such assignment maintain an action in his own name against the principal debtor."

The language of the statute it will be observed is "*bond or other obligation for the payment of money*," and in this respect it differs materially from the Statute of 19 and 20 Vic., ch. 97, sec. 5, which provides, that "every person who being surety for the debt or *duty of another*, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him \* \* \* and shall be entitled to stand in the place of the creditor in any action or other proceeding at law or in equity."

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The bond in this case is for the performance of a duty, and not for the payment of money. Its condition is, that the appellant, Crisfield, shall faithfully discharge the duties of the office of executor according to law. The State of Maryland is the obligee in the bond, and is the legal plaintiff in a suit upon the same, and the equitable plaintiff, the party to whose use the suit is brought, must assign and must recover upon the assignment of breaches. The recovery by such equitable plaintiff, does not however merge the bond in the judgment. It still remains as a security for all other persons interested in the estate of the testator, and upon which such persons may institute proceedings upon the failure of the executor to discharge his duty.

Such a bond is not therefore a bond for the payment of money, of which a surety is entitled to an assignment under this section, and by virtue of which he may maintain an action in his own name against the principal debtor.

It follows from what we have said, that neither at common law, nor under the statute, can Woolford maintain *an action on the bond* against Crisfield, the principal debtor, to recover the money paid by him as surety, because such payment operates at law as an *extinguishment of the bond*.

But, though such is the rule at common law, it by no means follows that such is the effect of a payment by a surety on a joint and several bond in equity. On the contrary, where one is obliged as surety to pay the debt of another, an equity arises in his favor to have all the rights and remedies, securities original and collateral, which the creditor may have or hold against the principal debtor, transferred to him; and to avail himself of them as fully as the creditor could have done, to the end that he may obtain full indemnity from the principal debtor. In other words, the surety is entitled to stand in the

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shoes of the creditor whose debt he has been obliged to pay.

The right of the surety to be thus subrogated to all the rights of the creditor is not founded on contract, but upon the plainest principles of natural justice; and is adopted by Courts of equity to compel the ultimate discharge of a debt by one who in equity and good conscience ought to pay it.

The doctrine of *Copes vs. Middleton*, 1 *Lur. & Russ.*, 226, that the payment by a surety of a debt due on a joint bond operates as an extinguishment of the bond in a Court of equity, is, against the earlier English decisions and against the civil law, and has not as a general rule been adopted in this country. On the contrary, the great weight of American authority is against it; we deem it unnecessary to examine the many cases in which the subject has been considered, because they are reviewed at length in the notes to the case of *Dering vs. Earl of Winchelsea*, 1 *White & Tudor's Leading Cases*, Part 1, 178.

We may add, however, that the doctrine of *Copes vs. Middleton*, is no longer the law in England. The Statute of 19 and 20 Victoria, provides expressly, that in all cases where the surety pays the debt of another, he shall be entitled to assignment, and shall be entitled to stand in the place of the creditor in any action or other proceeding at law or in equity. Whatever then may be the effect of the payment by Woolford as surety in a Court of law, we are of opinion that such payment does not operate as a satisfaction or extinguishment of the bond in equity; and that by such payment, he is entitled in equity to be subrogated to all the rights and remedies and securities, which the plaintiffs as creditors held against the appellant, the principal debtor.

As no action however can be maintained at law upon the bond itself, we must reverse the judgment below, without awarding a new trial. The appellees' remedy



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Mut. Life Ins. Co. *vs.* Bratt.

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*at law* is an action against the appellant, *for money paid* to his use.

*Judgment reversed, without  
awarding new trial.*

(Decided 17th December, 1880.)

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THE MUTUAL LIFE INSURANCE COMPANY OF BALTIMORE *vs.* MARY A. BRATT, by her next friend, JOSHUA OWINGS.

*Construction of a Policy of Life Insurance—Evidence.*

A non-forfeitable policy of life insurance issued by the appellant to the appellee in the amount of \$2000, for the term of the life of the assured, among other conditions contained the following: "If the said premiums shall not be paid on or before the days above mentioned for the payment thereof, at the office of the company in the City of Baltimore, (unless otherwise expressly agreed in writing,) or to agents when they produce receipts signed by the president or secretary, then in every such case, the said company shall not be liable for the payment of the whole sum assured, but only for an amount proportionate to the number of premiums paid."

In an action by the appellee to recover the amount of the insurance, among other things, the death of the assured was proved, and that prior to his decease, twenty-seven quarterly premiums had been regularly paid from the date of the policy, and that thereafter default was made, and no other quarterly premiums had been paid; and that four other quarterly premiums had after said default became due, and were unpaid at the decease of the assured.

HELD:

That the plaintiff was entitled to recover twenty-seven thirty-one parts of \$2000, with interest in the discretion of the Court on the amount so ascertained from the date of the institution of the suit.

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The charter and by-laws of the company and a table referred to in the application for insurance were admissible in evidence in this case, but not the portion of a volume entitled *The Principles and Practice of Life Insurance*, containing rules and modes of calculating and adjusting life insurances; nor the opinions of experts.

APPEAL from the Circuit Court for Howard County, on removal from the Baltimore City Court.

The case is stated in the opinion of the Court.

*Exception.*—At the trial of the case before the Court without a jury, the plaintiff offered four prayers, and the defendant, two. The substance of these prayers with their modifications is stated in the opinion, and also the instruction given by the Court below (MILLER and HAMMOND, J.) in lieu of the plaintiff's first prayer. On the rejection by the Court of the defendant's prayers, he excepted, and the finding of the Court and judgment thereon being in favor of the plaintiff for \$1819.15, with interest and costs, the defendant appealed.

The cause was argued before BARTOL, C. J., BOWIE, ALVEY and IRVING, J.

*William M. Merrick*, for the appellant.

The Court erred in rejecting the tables and printed rules of the company, printed and circulated prior to issuing this policy, because the company, being a mutual company, the insured was a party to those printed rules and regulations and declarations, as to the meaning and mode of computing payments upon policies, and the same were to be taken as if incorporated with the policy itself, and as guides to its meaning and interpretation. These are not oral evidence offered to explain, alter or vary a written contract; but existing writings, to which

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the parties to the contract refer and adopt as parcels of the contract itself, so far as applicable thereto. (See *Bliss on Insur.*, sec. 426, pp. 766, 767, and authorities in notes thereto; 34 *Md.*, 553, and *Taylor on Evid.*, sec. 1082.)

The evidence of the expert was merely a statement of those extrinsic facts and scientific principles to which the subject-matter of the contract related, and an acquaintance with which was essential to the proper understanding of the terms used in the contract. (See *Taylor on Evid.*, sec. 1058, 1060 to 1065, and 1082.)

But after all, the question remains, what is the meaning of the expression, "the company shall not be liable for the payment of the whole sum assured, but only for an amount proportionate to the number of premiums paid?"

Now, if we take the natural sense of the words, and do not by intendment supply anything which has been omitted by accident, ignorance or inadvertence, the expression here, since there were twenty-seven quarterly payments, is the same as saying the company shall be liable to a part of the sum insured, proportioned to twenty-seven. This is a manifest ambiguity, or to speak more correctly, is an expression having no meaning at all. Whether considered as a patent ambiguity, or a totally insensible expression, the same result must follow, that the plaintiff cannot recover.

We are necessarily driven to conjecture what was the meaning of the parties, for they have not expressed any in words, nor by any legitimate deductions from the words themselves, apart from the unexpressed principles and rules and motives of both contracting parties, which enter into every policy of life insurance.

The question then is, shall we resort to conjecture, or shall we interpret this contract according to the rules of equity, which this company has written, printed and promulgated, and to which the assured is a party, being by

the terms of the charter, section third, a member of the company, and a participant in its benefits and gains?

By turning to table No. 1 of this company, and its general rule, the Court will see that there is a standard of valuation assigned to every policy, as non-forfeitable, after payment of the annual premiums, and this standard is still more sharply defined in the printed regulations for computing values on default, when the whole policy is to be paid up within a definite number of years. The testimony of the expert, as to the proper mode of computing the valuation under the claim in question, corresponds with those rules, and makes a basis of calculation accordant with the theory of the defendant's second prayer, which the Court rejected.

Again, if we leave out of view those special rules, and interpret the expressions in the policy by the standard of the principles regulating general life insurance, and by the rules adopted for ascertaining the value of policies, when accidents, or contingencies unprovided for, call for an equitable valuation, we reach the rule and mode of valuation expressed in the defendant's first prayer, and which is based upon the doctrines of life insurance as explained by the expert, Hall, the actuary.

This principle of calculation accords with the doctrines announced by the Supreme Court of the United States, in 92 *Otto*, 24 to 35, and by the English Courts in *Bell's Case*, 9 *Law Reports, Equity Div.*, 706, and *Holdick's Case*, 14 *Law Rep., Equity Div.*, 72.

Another mode of computation which may be presumed to have been in the contemplation of the parties, is derived from the table of the expectation of life, table 14 of this company. The age of the insured being sixty-one, the expectation of his life was thirteen and a half years. He reasonably calculated to pay premiums for thirteen and a half years, then the proportion which he actually paid, seven, to the number contemplated, thirteen and a half,

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may well be taken in analogy to the rule expressed in defendant's second prayer, and to the rule in all policies for fixed terms of years, as the true proportion for which the company should be liable upon death after default, viz.,  $7-13\frac{1}{2}$  of the sum insured.

It is a well ascertained principle in life insurance, that a policy-holder is expected to confer a benefit by his contributions, and if he suffers the payments to lapse, he inflicts upon the company an injury equal to the present value at the term of breach of the future profits which the company might reasonably anticipate from his continued payments. Hence, as the injury is inflicted upon the company at the date of the first breach, the measure of their injury should be the correlative measure of the price or proportion to be paid to him upon the hypothesis of non-forfeiture, in other words, the surrender value of the policy.

If it be alleged that there is no evidence, or that the testimony of the expert, or the passage from the work on insurance, verified by him and read to the Court, are not to be accepted as legal evidence; nevertheless, those are matters of which the Court can and ought to take judicial notice, and the Court may rightfully call in aid those sources of instruction in aid of its own knowledge. It may be well to advert also to the non-forfeiture law of Massachusetts, which is explained and quoted in *Bliss*, sec. 203, for the purpose of ascertaining that great underlying rule of equity, between the insurer and insured, which must be taken into account in interpreting the clauses of the policy now before the Court. For it is too clear for controversy, that the words of the policy, unaided by extrinsic circumstances, are not expressive of any exact meeting between the minds of the contracting parties, and the question, therefore recurs, what rule of interpretation will best effectuate justice between the parties?

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*Samuel Snowden*, for the appellee.

The construction of policies of insurance is to be governed by the same principles as are applied in the construction of other contracts. *National Insurance Company vs. Crane*, 16 Md., 260; 7 U. S. Digest, (1st Series,) p. 638, sec. 72; 4 *Wait's Actions and Defences*, 106.

They are to be construed liberally in favor of the insured. *Rolker vs. Great Western Insurance Company*, 4 Abb. App. Dec., 76; *Wells vs. Pacific Insurance Company*, 44 Cal., 39; *Com. Ins. Co. vs. Robinson*, 64 Ill., 265.

And in case of ambiguity, the language must be considered that of the company, and construed most strongly against it. Conditions of forfeiture receive a strict construction against the company for whose benefit they are introduced. *Symonds vs. North W. M. L. I. Co.*, 6 Ins. Laws Jour., 648, sec. 149.

And the policy must be taken as expressing the final agreement of the parties, and as merging all previous verbal stipulations. *Insurance Company vs. Mowry*, 96 U. S. (6 Otto.)

Applying these well settled rules to the construction of this policy, it is susceptible of a reasonable construction upon its face, without resorting to extrinsic evidence. The insurance was to continue "*for the natural life of Henry Bell*;" and if the quarterly premiums were paid by him up to the time of his death, then the company agreed to pay to the plaintiff the sum of \$2000, but in case he failed to pay the premiums, then the company provided "*that it should not be liable for the payment of the whole sum insured, but only for an amount proportionate to the number of premiums paid.*" This language is restrictive, limiting the liability, but implying liability within the limitation imposed, according to the rule laid down by the Supreme Court of Maine, in construing a similar provision. *Dorr vs. Phoenix Life Insurance Company*, 67 Maine, 438.

As soon as Bell made default in the payment of the premiums, the policy became an insurance upon his life, for such an amount as might be ascertained at his death to be proportionate to the number of premiums paid by him. As, therefore, he paid twenty-seven quarterly premiums, and lived until after thirty-one quarterly payments became due, the company became bound to pay so much of the sum assured as the number of premiums paid by Bell, up to the time when he ceased to pay the premiums as they became due, would bear to the number of premiums which fell due up to the time of his death. The death of Bell fixed the time when the payment of such proportion of the amount assured became due to the plaintiff.

The rule, embodied in the instruction given by the Court, is in accordance with this construction of the policy—which being expressed in language neither technical nor ambiguous, no parol evidence could be admitted to determine the intention of the parties. *Hough vs. Peoples' Fire Insurance Company*, 36 Md., 398; *Partridge vs. Insurance Company*, 15 Wall., 573.

The testimony of the actuary was directly in conflict with the provisions of the policy. Instead of giving to the policy a construction in accordance with its terms, it incorporated therein another and a different contract from that made by the parties. Nothing is said in the policy about the payment of the equitable value of the policy, as calculated by an actuary, upon the theory that a man ought to live to be ninety-five years of age, but the insurance is for the term of Bell's life. It was the happening of that event which fixed the other proportion.

The book entitled "Principles of Life Insurance" was not admissible in evidence. It consists of the various theories and calculations of an actuary of life insurance companies, and does not contain any evidence of facts pertinent to the issues in this case.

The charter and by-laws were admitted by the Court, but the pamphlet entitled "Mutual Life Insurance Company" was rejected, except Table No. 1 therein contained. This book contains only rules for the instruction of agents, and the different plans upon which the company would insure. The members are only bound by the charter and by-laws, and not by any such rules. *Bliss on Life Insur.*, sec. 426.

BOWIE, J., delivered the opinion of the Court.

The question involved in this appeal is the proper construction of a policy of Life Insurance, issued by the appellant to the appellee, in the amount of two thousand dollars for the term of the natural life of the assured.

The policy among other conditions and agreements contained the following, viz.,

2nd. "If the said premiums shall not be paid on or before the days above mentioned, for the payment thereof, at the office of the company in the City of Baltimore, (unless otherwise expressly agreed in writing,) or to agents when they produce receipts signed by the President or Secretary, then in every such case the said company shall not be liable for the payment of the whole sum assured, but only for an amount proportionate to the number of premiums paid."

At the trial before the Court upon submission without a jury, the plaintiff, to sustain the issues on his part offered in evidence the charter of the defendant, the policy of insurance and application for insurance thereto annexed upon the life of Henry Bell, and proved the death of said Bell on the third of July, 1878, and that due proof and notice of the same was given to the defendant more than ninety days before the suit was brought; the plaintiff also proved that prior to the decease of said Bell, twenty-seven quarterly premiums had been regularly paid from the date of the policy, and that, thereafter, default was made, and



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no other quarterly premiums had been paid, and four other quarterly premiums had after said default become due and were unpaid at the decease of the assured.

The defendant then offered in evidence, subject to exception, certain printed pages of a volume entitled "The Principles and Practice of Life Insurance," also a printed pamphlet entitled "The Charter and By-Laws of the Mutual Life Insurance Company of Baltimore," and proved that the same had been printed and circulated prior to the application for said policy by the authority of the Company.

They also offered to prove by the actuary of the company, that he was for many years conversant as an actuary with the business and practice of life insurance, and thoroughly acquainted with the principles, rules and modes of calculating and adjusting life insurances, and that said volume entitled "The Principles and Practice of Life Insurance," is a standard work of recognized authority in the business of life insurance, and the exposition of said rules and principles as read by the defendant from said volume, are recognized and accepted in the business of life insurance as authoritative and correct.

The defendant further proved by the actuary, that condition numbered "2nd," as printed in the body of said policy, which regulates the mode of payment by the company in case default shall have been made in the payment of premiums, is the regular and appropriate formula used in the cases of policies, where the whole premium on an insurance for life is provided to be paid up within a definite number of years upon the non-forfeitable plan, and that in such cases, under that clause or formula, the mode of payment would be to pay to the party entitled such a proportion of the sum insured, as the number of premiums actually paid would bear to the whole number of premiums contemplated by the policy; for example, in a policy for life to be paid up in ten annual premiums, and default

made after the seventh, the proportion would be seventh-tenths of the amount insured, and so in similar cases.

Testimony was further offered to show, that certain tables known as Expectation Tables are never used in the business of insurance, and that in ordinary life insurance the computation upon which all insurance is made and all premiums are calculated is, upon the probability of a life enduring to the utmost limit of human life, viz., to ninety-five years; that as an expert he would under the aforesaid condition of the policy calculate the sum to be paid the plaintiff by the ratio of the number of premiums paid, to the number which might have been paid in case the assured had survived to the age of ninety-five, and which, the age of the assured being given in the policy, would be the proportion which twenty-seven, the premiums actually paid, bears to one hundred and forty, the possible number, comparing the age of the insured to the limit of human life. The defendant also proved by said witness that the equitable value of this policy at the time of the default made in paying its premiums, according to the known and recognized rule for computing such value would be \$429.23, and thereupon the defendant rested.

The plaintiff then offered a series of prayers construing the policy, and defining the proportion of the whole sum assured, which the plaintiff was entitled to recover; and excluding the evidence offered by the defendant to govern that construction.

The defendant submitted two prayers maintaining his theory, founded upon the principles laid down in the books offered by him in evidence, and the testimony of the actuary.

The Court below, in lieu of the plaintiff's first prayer, substituted a ruling of its own; granted the plaintiff's second prayer, excluding the book called Principles of Life Insurance, and the parts read therefrom by the defendant, as evidence in the cause, and granted the

plaintiff's third prayer with a modification. The defendant's prayers, affirming, first, that the plaintiff was only entitled to recover the equitable value of the policy at the time of the payment of the last premium; 2ndly. That the proportion of the amount of insurance payable to the plaintiff, is that proportion which the number of premiums paid bears to the whole number of premiums contemplated by the policy at the time it was entered into, and that said whole number of premiums is to be considered with reference to the possible duration of life extending to ninety-five years, etc., were rejected. The defendant appealed from each and every of said rulings in favor of the plaintiff, and against the appellant.

The instruction or ruling granted by the Court, in lieu of the plaintiff's first prayer, is as follows:

"It being admitted that thirty-one quarterly payments of premiums had accrued at the death of Henry Bell, whose life was insured by the policy offered in evidence, and that twenty-seven of them only had been duly paid by the assured, the Court rules, that according to the true construction of the policy sued on, the plaintiff is entitled to recover  $\frac{1}{3}$  parts of \$2000, the sum for which the life of Bell was insured, with interest, in the discretion of the Court, on the amount so ascertained from the date of the institution of this suit."

The adoption of this ruling by the Court as its guide in construing the policy, and ascertaining the amount to which the plaintiff is entitled, was virtually a negation of all the defendant's theories, and of the evidence upon which he based them. There can, we think, be no doubt of the correctness of the action of the Court below in its several rulings.

The policy sued on, was issued by a Mutual Life Insurance Company, upon what is called the non-forfeitable principle.

"The fact that the policy is a contract between a mutual company and one of its members, does not modify the

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construction to be given to its terms. The relations of the parties are always to be considered in seeking the true interpretation of their language. But their words used for a definite purpose, and applied to a transaction of well understood character, must be held to convey the meaning and force which is ordinarily applied to them." *Bliss on Life Ins.*, 656, 657.

The second condition of the policy, provided that in cases of default of payment of premiums, "then in every such case, the said company shall not be liable for the payment of the whole sum assured, but only for an amount proportionate to the number of premiums paid."

The insurance was to continue for the natural life of the assured. The whole sum assured, was \$2000; twenty-seven quarterly payments had been made, and four were overdue. If all the quarterly payments had been paid, there could be no question or doubt about the right to recover the whole amount insured, but a part only being paid, equity and justice, as well as the language of the contract dictated, a *pro rata* amount.

It is the very essence of a non-forfeitable policy, that the insurers should pay in proportion to the premiums received, as prescribed by the conditions.

The appellant contends, the Court erred in rejecting the tables and printed rules of the company, printed and circulated prior to issuing this policy, because the company being a mutual company, the insured was a party to those printed rules and declarations as to the meaning and mode of computing payments upon policies, and that the same were to be taken as if incorporated in the policy itself, and as guides to its meaning and interpretation. The Court below excluded such as they deemed foreign to the contract, but admitted the charter and by-laws, and table No. 1, being the table referred to in the application for insurance. The assured becoming a member of the company, by the act of insurance, was bound by those,

but not by the other publications, or the speculative theories of writers on insurance, or the opinions of experts. *Bliss on Ins.*, ch. 16, sec. 427.

There was no evidence that the printed matter excluded, had been practically adopted by the defendant, in the course of its business transactions. There was no proof of a custom or usage to settle the claims of policy holders in such cases, upon the basis of the equitable value of the policy, or upon the theory that the proportion of the assured was to be ascertained by the ratio of the number of the premiums paid, to the number which might have been paid had the assured survived to the extreme limit of human life, or that the assured had accepted the policy upon such conditions.

The Court below admitted all the documents which tended to show the meaning of the contract, and the rights and obligations of the company and the assured. Notwithstanding the learned and ingenious argument for the appellant, it seems to us, the cases cited by the appellant do not apply to or control a case like the present.

The contract in this instance is susceptible of a reasonable and equitable interpretation, without the aid of extraneous instruments or expert testimony. If it was ambiguous, as contended by the appellant, that construction must be adopted, which is most favorable to the promisee. *Bliss on Ins.*, p. 656, sec. 385.

Finding no error in the rulings of the Court below, the same will be affirmed.

*Judgment affirmed.*

(Decided 17th December, 1880.)

ANN PORTER, by her husband and next friend JOSHUA  
S. PORTER *vs.* MAHLON BOWERS.

*Property acquired by a Wife before the Act of 1841, ch. 161—  
Rights of Husband—Actions—Rules of Court—Appeal.*

To the possession of land given to a wife by her father in 1840, the husband having children by the wife, became entitled *jure uxoris*, and to the pernanacy of profits during their joint lives, and as tenant by the curtesy upon her death, if he should survive her; and this title was not divested by the Act of 1841, ch. 161, or by the provisions of the Code of 1860. During the continuance of his life estate, he alone is entitled to sue for an injury to the possession or profits of the land; for an injury to the inheritance the suit must be in the joint names of himself and wife.

Where the rules of the Court below provided, that after all the testimony was in, the prayers should all be offered and argued together, and that when the law of the case should have been elicited and settled, no additional prayers would be received unless by permission of the Court, the Court refused to consider additional prayers offered by a plaintiff after the Court had rejected his prayers and granted the defendant's. On exception by the plaintiff, it was HELD:

That this was a matter within the discretion of the Court below, and not the subject of an appeal.

APPEAL from the Circuit Court for Carroll County.

The case is stated in the opinion of the Court.

*Exception.*—At the trial, the plaintiff offered three prayers, which were rejected by the Court below, (HAYDEN, J.,) and which need not be set out; the defendant offered one prayer which was granted, and which is stated in the opinion. Whereupon the counsel for the plaintiff gave notice to the Court, that he excepted to the rejection of the plaintiff's prayers, and the granting of the defendant's

prayer, and thereupon the Court adjourned until the following morning, the 14th May, 1880, and on the assembling of the Court on the said 14th May, the counsel for the plaintiff offered for the consideration of the Court, two other prayers, four and five, purporting to be in reply to the defendant's prayer, which had been granted by the Court as aforesaid. These prayers need not be set out.

Which said fourth or fifth prayers of the plaintiff, the Court below refused to receive or consider, because the rules of the Court require, that on the close of the proof and evidence in any case, all the prayers shall be offered for the consideration of the Court, that the counsel on either side may propose to offer, otherwise the Court may refuse to receive or entertain them. Rules relating to offering prayers :

Ordered, this 8th day of June, 1868, that in the trial of causes in this Court, in which juries are empanelled, the following rules shall be observed and adhered to, and that the same shall take effect from this date.

1st. After all the testimony intended to be offered by the plaintiff and defendant shall have been introduced, the Court will expect to be furnished with all the prayers which the parties respectively may propose to found thereon; these prayers shall be argued in connection together, unless otherwise directed by the Court—the plaintiff, if he shall have submitted any material proposition, not admitted by the defendant, being entitled to open and conclude the whole.

2nd. When the law of the case shall have been elicited and settled, as contemplated by the above preceding rule, no additional prayer or prayers will be received, nor additional evidence be given to the jury, unless by permission of the Court.

Whereupon, the plaintiff excepted to the rejection by the Court of the plaintiff's said first three mentioned prayers, and to the granting of the defendant's prayer,

and to the refusal of the Court to entertain or consider the plaintiff's said fourth and fifth prayers.

The verdict and judgment being for the defendant, the plaintiff appealed.

The cause was argued before BARTOL, C. J., MILLER, ALVEY and IRVING, J.

*William P. Maulsby*, for the appellant.

*William A. McKellip* and *John E. Smith*, for the appellee.

BARTOL, C. J., delivered the opinion of the Court.

This is an action of trespass *q. c. f.* brought by the appellant, a married woman, by her husband as next friend, against the appellee.

It appeared in proof that the land on which the alleged trespass had been committed, was given to the appellant by her father in 1840. She being at that time the wife of Joshua S. Porter; that she and her husband have ever since lived together as man and wife, and have children born to them alive; that they have continued ever since in the possession and occupancy of the land.

The Circuit Court instructed the jury upon this state of facts "that the land in question is not the separate property of the plaintiff, and that she is not entitled to maintain this action by her next friend, and that under the pleading and all the evidence in the cause the plaintiff is not entitled to recover."

There can be no doubt of the correctness of this instruction.

The title to the land in fee, having been acquired by Mrs. Porter during her coverture, and before the Act of 1841, ch. 161, her husband became entitled *jure uxoris* to the possession thereof, and the pernaney of profits during



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their joint lives, and as tenant by the curtesy upon her death if he should survive her. This title of his was not divested by the Act of 1841, ch. 161, or by the provisions of the Code of 1860.

During the continuance of his life estate, he alone is entitled to sue for an injury to the possession or profits of the land; for an injury to the inheritance, the suit must be in the joint names of himself and wife. *Rice, et al. vs. Hoffman*, 35 Md., 349; 2 *Kent's Com.*, sec. 28.

It is clear that the present suit cannot be maintained in the name of the *feme covert* by next friend. *Bridges & Woods vs. McKinna*, 14 Md., 269; *Barr & Wife vs. White*, 22 Md., 259.

It follows that there was no error in rejecting the first, second and third prayers of the plaintiff.

As to the fourth and fifth prayers offered by the plaintiff, and which the Circuit Court refused to receive or consider, under the rule of Court; no error can be predicated of the Court's action in this respect, as it rested in its discretion. *Bushey vs. Culler*, 26 Md., 534.

It may also be added, that as the defendant's prayer was properly granted, the fourth and fifth prayers of the plaintiff, if they had been offered in time, must have been rejected, and consequently no injury was done to the plaintiff by the refusal of the Circuit Court to receive or consider them.

*Judgment affirmed.*

(Decided 13th January, 1881.)

ARUNAH S. ABELL *vs.* FREDERICK J. BROWN, Surviving Trustee.

*Acts of a Trustee without Order of Court—Right of Trustees to maintain a Suit without Order of Court first obtained—Setting Aside a Release of Mortgage—Breach of Trust.*

By an order of the Superior Court of Baltimore City, passed in a cause in equity the 8th February, 1869, E. W. B. who had, in September, 1863, been duly appointed trustee therein, was authorized to loan to W. G. R. the husband of E., one of the *cestuis que trust*, \$12,000, of the trust fund of said cause, secured by the bond of W. G. R. and Mrs. S. C. R., and a mortgage of a farm in Baltimore County. On the 23rd December, 1869, E. W. B., trustee, without order of or report to the Court, and without its approval, released the mortgage of the farm, and on the same day took in lieu thereof to secure the same loan, a mortgage from Mrs. S. C. R. of another tract of land in said county. On the 28th April, 1870, E. W. B., trustee, without order of or report to the Court, and without its approval, united with Mrs. S. C. R. in executing a deed to P., conveying to him a part of the tract of land included in the mortgage last mentioned in consideration of \$5026.88, paid by P. but not to the trustee, thereby releasing from the mortgage the parcel so conveyed. On the 6th January, 1871, this parcel was, for a valuable consideration, conveyed by P. and wife to A. In November, 1871, Mrs. S. C. R. made a deed of trust of all her property for the benefit of her creditors. Her estate paid a very small dividend. W. G. R. died insolvent in February, 1878. After the death of E. W. B. in October, 1877, F. J. B. and the late F. W. B. were by order of the Superior Court, appointed trustees in E. W. B.'s stead. Default having been made in paying the interest on the loan, and in paying the principal, after due notice, the new trustees proceeded under the power contained in the mortgage of the 23rd December, 1869, to sell all such part of the tract of land as remained unreleased. The sale was duly reported to and ratified by the Circuit Court for Baltimore County. The proceeds from the sale were \$5206, leaving a balance still due the trustees of \$8614.42, with interest from the day of sale, the 30th April, 1878. On the

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17th May, 1878, without authority from the Superior Court, for that purpose first obtained, the trustees filed their bill in the Circuit Court for Baltimore County, to set aside the release executed by E. W. B., late trustee, to P., and to obtain a decree for the sale of the parcel of the land (not worth more than the balance due,) conveyed by P. and wife to A., for the purpose of satisfying the said balance. **Held:**

1st. That the trustees had authority to institute the suit; and that the Circuit Court for Baltimore County had jurisdiction.

2nd. That they were entitled to the relief prayed.

**APPEAL** from the Circuit Court for Baltimore County, in Equity.

The case is stated in the opinion of the Court.

The cause was argued before **BARTOL, C. J., BOWIE, MILLER, ALVEY and IRVING, J.**

*Charles J. M. Gwinn*, for the appellant.

*Frederick J. Brown*, for the appellee.

**BARTOL, C. J.**, delivered the opinion of the Court.

There is no dispute about the facts of this case; most of them are embodied in an agreed statement contained in the record.

It appears that by an order of the Superior Court of Baltimore City, sitting in equity, passed in September 1863, in the case of *Waters vs. Waters*, the late E. W. Blanchard, Esq., was appointed trustee of the estate of Charles Waters, deceased, and continued to act as such trustee till the time of his death in August 1877.

By the order of the Superior Court, passed on the 8th day of February 1869, Mr. Blanchard was authorized to loan to Wm. George Read, the husband of Elizabeth A., one of the *cestuis que trust*, \$12,000 of the trust fund,

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secured by the bond of Wm. George Read, and Mrs. Sophia C. Read, and a mortgage of a farm in Baltimore County, known as the "Grove" or "Manor Vale Farm." The bond and mortgage were executed in proper form, and the latter was duly recorded.

On the 23rd day of December 1869, the trustee without being directed to do so by the Superior Court, and without his action therein being reported to, or approved by that Court, released the mortgage of the "Manor Vale Farm," and on the same day took in lieu thereof to secure the same loan, a mortgage from Mrs. Sophia C. Read of seven parcels of land, situated in Baltimore County, near the Philadelphia turnpike road, containing about eight hundred and eighty-two acres.

On the 28th day of April 1870, the trustee united with Mrs. S. C. Read in executing a deed to Thornton P. Pendleton, conveying to him *one hundred and sixty-nine and a half acres*, being a part of the land included in the mortgage of Mrs. S. C. Read, thereby releasing from the mortgage the parcel so conveyed. The consideration paid by Pendleton, as stated in the deed, was \$5026.88, and it is shown by the proof, that no part of this consideration was paid to or received by the trustee. The deed to Pendleton was executed by the trustee without the order or sanction of the Superior Court, and his action in the premises was not at any time reported to, or approved by the Court.

On the 6th day of January 1871, this parcel of one hundred and sixty-nine and a half acres was, for a valuable consideration, conveyed by Pendleton and wife to the appellant, who now holds the same.

In November 1871, Mrs. S. C. Read, being in embarrassed circumstances, made a deed of trust of all her property to Stewart and O'Donnell, for the benefit of her creditors; but her estate in the hands of her trustees, has proved insufficient to pay any but an insignificant divi-

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dend to her creditors. After making the deed of trust, she was without means, and Wm. George Read, her co-obligor in the bond given February 8th 1869, died insolvent in February 1878.

After the death of Mr Blanchard, viz., on the 30th day of October 1877, the appellee and the late F. W. Brune, Esq., were, by the order of the Superior Court, appointed trustees in the place and stead of Mr. Blanchard.

Default having been made in paying the interest on the loan, and also in paying the principal, after due notice, the new trustees proceeded, under the power contained in the mortgage of December 23rd 1869, to sell all such part of the lands near the Philadelphia road, as remained unreleased in their hands, as successors in the trust. The sale was duly reported to the Circuit Court for Baltimore County, and ratified. It is admitted that the sale was fair and *bona fide*, the proceeds therefrom were \$5206, leaving a balance still due to the trustees of \$8614.42, with interest from April 30th 1878, the day of sale.

On the 17th day of May 1878, the trustees filed their bill in the Circuit Court for Baltimore County, praying that the release executed by the former trustee to Pendleton, dated April 28th 1870, be vacated and set aside, and that the parcel of one hundred and sixty-nine and a half acres, conveyed by Pendleton and wife to the appellant, be decreed to be subject to be sold for the purpose of satisfying the balance of the mortgage debt. It is admitted for the purposes of this case, that the land so conveyed to the appellant, is not worth more than the said balance of the mortgage debt.

This appeal is from the decree of the Circuit Court granting the relief prayed.

Without the authority or sanction of the Court, the former trustee had no power to release from the lien of the mortgage any part of the property, and it was a breach of trust on his part to unite in the deed to Pendle-

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tion for that purpose; especially as no part of the consideration for the deed, was paid to the trustee. As said in *Lewin on Trusts*, 571 m. (2nd Am. Ed.): "Where trustees are mortgagees, they are often requested to release part of the land from the security, in order to enable the mortgagor to deal with it for his own convenience. Where the value of the land is not excessive as compared with the debt, it would of course be a gross breach of trust to deteriorate the security." Pendleton having knowledge that the mortgage was trust property, and being, therefore, a participant in the breach of duty by the trustee, could receive no benefit from the release, the property while in his hands would be held subject to the mortgage, and a Court of equity would not hesitate to set the release aside at the instance of the *cestuis que trust*. As said in 1 *Perry on Trusts*, s. 217: "It is a universal rule, that if a man purchases property of a trustee, with notice of the trust, he shall be charged with the same trust, in respect to the property, as the trustee from whom he purchased." We refer also to *Lewin on Trusts*, ch. XXVI, sec. 1; 1 *Story's Eq. J.*, sec. 395, and secs. 1257 to 1265; *Oliver vs. Piatt*, 3 *Howard S. C. R.*, 401; *Lowry vs. Com. and Farmers' Bank*, *Campbell's R.*, 310; and *Stewart and Duffy, Trustees, vs. Firemen's Ins. Co.*, 53 *Md.*, 564.

It is equally well settled that if a party who has thus dealt with the trustee, and acquired property in violation of the trust, has aliened the same to a third person who acquires the title with notice of the trust and of its breach, it may be followed into the hands of the alienee.

This proposition is established by the authorities before cited, and by the whole current of decisions. The question then to be determined is whether the appellant stands in the position of a *bona fide* purchaser without notice, and entitled to protection. There is no evidence that he had any actual knowledge of the trust, or of the

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equities of the *cestuis que trust* in the property, at the time he purchased and received his deed from Pendleton. But actual knowledge is not required to be shown in order to affect the rights of the appellant; for this purpose it is sufficient to show that he had constructive notice. The deed from Pendleton to him dated January 6th 1871, informed him that the property had been acquired by his grantor, by a conveyance from Sophia C. Read and E. Wyatt Blanchard, *trustee*, dated April 27th 1870, which was of record, and which in terms referred to the mortgage of the property from Sophia C. Read to E. Wyatt Blanchard, *trustee*, of the estate of Charles Waters, deceased, dated December 23rd 1869, and which was also of record.

"The registration of a conveyance operates as constructive notice to all subsequent purchasers, of any estate legal or equitable in the same property." 1 *Story's Eq. J.*, sec. 403. This is the established law in Maryland. *Williams vs. Banks*, 11 *Md.*, 198; *Cook's Lessee vs. Kell*, 13 *Md.*, 469.

"What is sufficient to put a purchaser on inquiry is good notice, that is, where a man has sufficient information to lead him to a fact, he shall be deemed conusant of it." 2 *Sugden on Vendors*, 762*m*, and on page 775*m*, it is laid down that "in all cases where a purchaser cannot make out a title, but by a deed which leads him to another fact, whether by description of the parties, recital or otherwise, he shall be deemed conusant thereof, for it was *crassa negligentia* that he sought not after it; and for the same reason if a purchaser has notice of a deed, he is bound by all its contents." We refer also to *Baynard vs. Norris*, 5 *Gill*, 483; *Price, et al. vs. McDonald*, 1 *Md.*, 403, and *Magruder vs. Peter*, 11 *G. & J.*, 218, 243.

It follows from the application of these rules to the evidence in the record, that the appellant must be charged with constructive notice of the trust, and of its breach.

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His deed informed him that the title was derived from a trustee, the mortgage of December 23rd 1869, informed him that the same property was held by Mr. Blanchard as trustee of the estate of Charles Waters, deceased, and constituted a part of the trust fund. A reference to the record of proceedings in the Superior Court under which the trustee derived his appointment, if examined, and it was his duty to examine them, would have informed him of the nature of the trust, and the powers and duties of the trustee, and he would have discovered that the act of the trustee in releasing the property in question from the operation of the mortgage was without the order or sanction of the Court; and having taken the title under such circumstances, he cannot claim the protection of a *bona fide* purchaser without notice. The property in his hands remains charged with the trust, and liable to be followed by the *cestuis que trust*, and subject to the payment of the mortgage.

The rights of the *cestuis que trust* may be asserted by the appellee. It was decided in *Stewart & Duffy vs. The Insurance Company*, before referred to, that the new trustees appointed as in the present case, have the right to maintain suits against the proper parties, for breaches of trust committed by their predecessors, or for injuries done to the trust property while in their hands, and under their management; and that in a bill filed for that purpose, the *cestuis que trust* are not necessary parties. We have treated the case thus far as if the mortgage of December 23rd 1869, was the instrument originally executed as a security for the loan to Wm. George Read. It appears from the record, as before stated, that the mortgage of the "Manor Vale Farm," which was originally taken by the trustee under the order of the Court, was without the sanction or authority of the Court released, and the mortgage of December 23rd 1869, was taken by him in lieu thereof. Undoubtedly, in this respect, the



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trustee acted in violation of his duty, and committed a breach of trust; and one of the defences relied on in the answer, is that the consequence resulting from the unauthorized action of the trustee in this respect, is that the mortgage originally taken remains in force, and that of December 23rd 1869, operated only as a security taken by Mr. Blanchard in his own right, and not as *trustee*. Or in other words, because the former mortgage was released without proper authority, the last mentioned mortgage cannot be enforced for the benefit of the *cestuis que trust*. But we do not assent to this proposition. Whatever right or claim may still exist under the former mortgage, is a question with which the appellee in this case has nothing to do. The breach of duty on the part of the trustee in releasing the property first mortgaged, is no answer to the claim now asserted under the mortgage of December 23rd 1869. This was, in fact, taken by Mr. Blanchard in his character as trustee, to secure a loan of the trust fund, and in lieu of the mortgage of the "Manor Vale Farm." In *Heth vs. Railroad Company*, 4 *Grattan*, 482, it was held that "property to which a trust has attached will be subjected to the trust, in the hands of a purchaser for value who has constructive notice of the trust; and this, though it was irregular in the trustee to invest the trust fund in the property."

And this is consonant both with reason and authority. The parties holding the "Manor Vale Farm" are not parties to this suit. Whatever rights may exist against that property in favor of the *cestuis que trust*, or on the part of the appellant for contribution, are questions which do not arise upon the record, and we express no opinion thereon.

It remains to be considered, 1st. Whether the Circuit Court had jurisdiction of the cause, and 2nd. Whether complainants had authority to institute the suit.

1st. As to the jurisdiction, it does not appear by the record that any objection was made in the Court below,

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on the ground of want of jurisdiction; but waiving this difficulty, and assuming that this objection has been taken in time, we are of opinion that it is not tenable.

The ground upon which it is based, is that the Superior Court having acquired jurisdiction over the subject-matter of the trust estate, was entitled to retain exclusive control over its management; but it is obvious that the institution of this suit in no manner attempts to take away from the Superior Court its exclusive control over the management of the trust. The trustee is the officer of the Superior Court, acting under, and subject to its authority, and bound to account in that Court for the trust funds coming into his hands. To recover such funds, he may institute suits at law or in equity, and must bring such suits in the Court having jurisdiction in the premises. Such a proceeding is in no sense an interference with the jurisdiction of the Superior Court, in the management of the trust. In this case the land in question lies in Baltimore County, and the defendant resides in that county, out of the jurisdiction of the Superior Court; the suit was therefore instituted in the proper Court.

2nd. As to the capacity of the complainants to sue. It does not appear that they obtained from the Superior Court authority to file the bill, and it is contended, that without such authority they are not entitled to maintain the suit. In support of this position, the appellant has referred to 2 *Perry on Trusts*, sec. 474, where it is said, speaking of the powers of trustees, "they cannot begin nor defend any suit without the leave of the Court." A reference to the authorities, cited by the author, and to those referred to by the appellant do not entirely support the proposition as stated in the text. It is doubtless proper in all cases that a trustee, for his own protection shall before commencing a suit consult the Court and obtain its sanction; without this, he takes upon himself

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the risk of obtaining from the Court a ratification of his acts, and of being allowed the costs and expenses he may incur ; but the previous order of the Court is not essential to his right to sue. In *Lewin on Trusts*, ch. XIX, p. 513, it is said: "It is a general rule in equity, that what is compellable by suit, or would have been ordered by the Court, is equally valid if done by the trustee without suit, i. e. without the sanction of the Court," and *Perry in sec. 476*, lays it down "as a rule in equity that a trustee may safely do that without a decree of the Court, which the Court on a case made would order or decree him to do," and for this is cited *Hatton vs. Weems*, 12 G. & J., 83. Such is the settled practice in Maryland; the Court does not hesitate to sanction what a trustee does in good faith for the benefit of the trust estate, whether he has or has not first applied to the Court for authority. *Brown vs. Hazlehurst*, 54 Md. We refer also to *Stewart & Duffy vs. The Insurance Company*, before cited, in which this Court said: "It was not only the right of the trustees, but their duty, if in their judgment they deemed a suit upon the trustees' bond of their predecessors would be ineffectual or insufficient to secure the trust estate, to proceed at once against the responsible corporation."

The decree of the Circuit Court will be affirmed, and the cause remanded.

*Decree affirmed, and  
cause remanded.*

(Decided 13th January, 1881.)

SARAH M. RAMSBURG, by her husband and next friend  
NEWTON A. RAMSBURG vs. LAURA CAMPBELL, by  
her husband and next friend ROBERT CAMPBELL.

*Credibility of Evidence—Acknowledgment of a Mortgage  
before a Justice of the Peace, repudiated by the Mortgagors  
and affirmed by the Justice who took it.*

Where, in a proceeding to obtain an injunction against the sale of mortgaged premises under a decree, on the ground that the mortgage, though regular on its face, was not acknowledged as it purported to be before a justice of the peace, and the justice being examined as a witness, and looking at the original mortgage filed in the case, identified his signature as a witness and said, he saw each of the parties sign the same, and identifying his signature as a justice of the peace to the certificate endorsed on the mortgage, said he took the acknowledgment of the mortgagors, husband and wife, at their house on a certain street, naming it, and the mortgagors denied that the justice was ever at their house, and the mother of the wife corroborated them, credit should be given to the justice, rather than to those who would repudiate their own acts.

APPEAL from the Circuit Court of Baltimore City.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., BOWIE, MILLER, ROBINSON and IRVING, J., for the appellee, and submitted on brief for the appellant.

*Edgar H. Gans*, for the appellant.

*W. B. Trundle*, for the appellee.

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Ramsburg *vs.* Campbell.

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BOWIE, J., delivered the opinion of the Court.

In the month of March, 1877, Messrs. Campbell & Ramsburg, partners in trade, failed in business, and became applicants for the benefit of the Bankrupt Act.

Their wives, Laura Campbell and Sarah M. Ramsburg, being each possessed of a separate estate through their respective agents, entered into an agreement, that Mrs. Campbell should purchase the claims of the creditors of Campbell & Ramsburg, at the rate of seventy-five cents on the dollar, amounting to the sum of \$16,985, for one-half of which she should be indemnified by Sarah M. Ramsburg, and that the said Sarah, should be entitled to recover one-half of the dividends to be realized from said claims, beyond the amount necessary to pay said sum.

In consummation of this agreement, as a security for the sum of two thousand dollars, part of the indemnity aforesaid, a mortgage dated the 20th of October, 1877, reciting the agreement aforesaid, and that Mrs. Campbell, had paid \$3000 in cash and executed a mortgage to Wm. A. Fisher, as trustee for the creditors, to secure the sum of \$13,985.85, and that it was agreed as part of the indemnity aforesaid these presents should be executed, was signed and sealed by Mrs. Ramsburg and her husband, and ostensibly acknowledged in due form of law, before a justice of the peace of the City of Baltimore, and delivered to Wm. A. Hammond, Esq., agent and attorney for Mrs. Campbell, by Newton A. Ramsburg, one of the mortgagors, or by the justice of the peace, with his privity and consent.

The mortgage of the Ramsburgs, purported in consideration of the premises above recited, and therein set forth to convey certain leasehold property in the City of Baltimore to Laura Campbell, her executors and administrators, with the proviso, that if Sarah M. Ramsburg should pay to Wm. A. Hammond, trustee of Laura Campbell, one-half of said sum of \$13,985.85, secured to be

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paid to Wm. A. Fisher, trustee, for said creditors, by mortgage from said Laura on or before the 18th of October, 1878, etc., and should fully indemnify and save harmless the said Laura, as to one-half of said mortgage debt, and perform the covenants therein contained, on her part to be performed, the same should be void. The mortgagors, also assented thereby to the passage of a decree by any Court of competent jurisdiction for the sale of the mortgaged premises according to the provisions of the Public Local Code, etc., and contained the usual provisions for a sale of the premises in case of default.

Mrs. Ramsburg, through her husband, Newton A. Ramsburg, on the 20th October, 1877, paid to Mr. Hammond, trustee for Mrs. Campbell, \$3500 in cash, and delivered certain stocks, to be sold, at such times as should seem most advantageous, and the proceeds, together with the sum of \$2000, (secured by mortgage) to be applied to the payment of one-half the mortgage debt, secured by the mortgage of Mrs. Campbell to Fisher, trustee, for the creditors of Campbell & Ramsburg; the other \$1500 to be paid at once to said Fisher as trustee as aforesaid, as one-half of the \$3000, agreed to be paid in cash, besides the mortgage above referred to. Mrs. Campbell's mortgage to Fisher, was paid in full by Hammond as her trustee, with funds derived partly from money raised by Mrs. Campbell, and partly from the sale of the stocks of Mrs. Ramsburg, and cash received from Mrs. Ramsburg, and partly from collections from claims purchased, but Mrs. Ramsburg's proportion of payments being short, and the time allowed for the payment of the \$2000 indemnity, secured by the mortgage of Ramsburg, having expired, the appellee, by her next friend, filed her petition on the 3rd of November, 1879, in the Circuit Court of Baltimore City, with the original mortgage annexed, alleging there was a default, and praying a decree for sale. A decree for sale was passed

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on the 4th of November, 1879, and on the 29th of same month, the appellant, Sarah M. Ramsburg, her husband as next friend, filed in the same Court, a bill against the mortgagee and Robert Campbell, her next friend, praying that an account be had, that the sale may be stayed by injunction, *subpoenas*, etc. An injunction was issued as prayed. Answers being filed, the cause was referred to the auditor to take testimony, and state an account, and after various intermediate orders and proceedings, the auditor's account being amended and filed, it was on the 25th of May, 1880, ordered by the Circuit Court of Baltimore City, in the case of *Campbell, et al. vs. Ramsburg*, that the defendant bring into said Court on or before the 14th of June, 1880, the sum of \$2090.14, to be paid to the complainant, (Laura Campbell) and in default thereof, it is further ordered, that the injunction be dissolved, and the mortgage premises sold by the trustee, etc.

From which decree this appeal is taken. The two cases seem both in the Court below, and in this Court, to have been treated as one, and we shall consider them as such, although the record shows no order of consolidation.

The grounds for the injunction as alleged in the bill of the Ramsburgs, are substantially: 1st. That the mortgage of the 20th of October, 1877, on which the decree for sale was rendered, although signed by the complainant, Sarah, was not acknowledged by her before any justice of the peace, in conformity with the laws of Maryland, relating to mortgages by *femes covert*; that she never appeared before, and never made the acknowledgment of said paper as her act and deed, before Justice Hemmick, or any other justice of the peace.

2ndly. That she does not owe anything under said mortgage.

It is understood by the Court, that the latter point is abandoned in this Court, and the first alone relied on.

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The allegation of the appellant, Sarah, that she never acknowledged the mortgage before Justice Hemmick, or any other justice of the peace, involving as it does, a charge of gross misconduct and criminal violation of duty, on the part of the certifying justice, must be sustained by strong disinterested preponderating evidence. 1 *Greenleaf*, 106.

The burden of proof is upon the appellant. The justice of the peace, is an officer invested with high ministerial and judicial powers; one of the most important of which is, the power to take and certify the acknowledgment of deeds and other instruments, upon the validity of which the titles to all real estate and vast amounts of personal property depend. If the verity of their acts can be impeached by the negative testimony of the parties interested to destroy the deed, the most disastrous consequences might ensue.

In some of the earlier cases, where the question arose, it was held that no evidence could be received to invalidate the acknowledgment of a deed. *Bissett vs. Bissett*, 1 *H. & McH.*, 211.

In *Ridgely vs. Howard*, 3 *H. & McH.*, 321, where it appeared by the certificate of acknowledgment, that the grantor on a particular day appeared before two justices of the peace, and acknowledged the same, parol evidence to prove that the justices took the acknowledgment separately, at different times and places, was held inadmissible. See also *Gitting's Lessee vs. Hall*, 1 *H. & J.*, 14; *Miles vs. Knott*, 12 *G. & J.*, 455.

In more recent cases the rule has been relaxed, still great sanctity must be attached to official acts essential to the validity of all deeds of real and personal estate, (with few exceptions) and the indispensable preliminary to their registration.

The deed on its face, purports to have been signed and sealed by the grantors, and attested by George A. Hem-



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mick, and the attesting witness, George A. Hemmick, as a justice of the peace, certifies that on the 20th of October, 1877, the grantors appeared before him, and each acknowledged the foregoing mortgage to be their respective act. The justice of the peace being examined as a witness, and looking at the original mortgage filed in the case, identifies his signature as a witness, and says he saw each of the parties sign the same, and identifying his signature as justice of the peace to the certificate endorsed on the mortgage, says he took the acknowledgment of Mr. and Mrs. Ramsburg, at their house on Chatsworth street, or Myrtle avenue as it is called now. Mr. and Mrs. Ramsburg deny that the justice ever was at their house, and the mother of Mrs. Ramsburg corroborates them.

It is not proposed to institute a comparison of the evidence of the several witnesses. Independently of the rule, that affirmative evidence is to be preferred to merely negative assertion, the presumption of law is, that every officer discharges his duty until it is clearly shown to the contrary.

His signature to the documents, is *prima facie* evidence of the truth of the facts certified. His official character, his habit of business, his entire disinterestedness, added to the written evidence on the face of the paper make it impossible he should be mistaken as to the facts deposed and establish their truth, unless he has wilfully forsworn.

The testimony impeaching the justice proceeds from prejudiced persons, having a large pecuniary interest in the result, and is contradicted in several particulars.

In the case of *Sarlouis vs. The Firemen's Insurance Co.* where the return of a sheriff's deputy was impeached, this Court said: "The affirmative testimony of a public officer acting in the regular routine of his duty, without any motive to misrepresent, sustained by contemporaneous entries in his own hand, must be preferred to the negative evidence of employés of the garnishee corporation,

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from public policy as well as upon the rules of probability." 45 *Md.*, 244.

The same considerations of policy and probability compel us in this case, to give credit to the justice who attested and certified the acknowledgment of the mortgage, rather than to those who would repudiate their own acts.

Finding no error in the decree appealed from, the same will be affirmed with costs to the appellee.

*Decree affirmed.*

(Decided 14th January, 1881.)

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FARMVILLE INSURANCE AND BANKING COMPANY OF  
FARMVILLE, VIRGINIA, vs. KENNEDY H. BUTLER,  
use of GEORGE A. HOFFMAN.

*Bill to Reform a Policy of Fire Insurance.*

The appellant by its agent S. underwrote for B. a policy insuring against fire certain buildings and property in Cumberland, to the amount of \$2500. The property being destroyed by fire the appellant refused to pay the insurance, alleging non-compliance by the assured with the following condition of the policy: "If the interest of the assured in the property be any other than the entire, unconditional and sole ownership of the property, for the use and benefit of the assured, or if the building insured stands on leased ground, it must be so represented to the company, and so expressed in the written part of the policy, otherwise the policy shall be void." The following condition was also in the policy: "If the interest of the assured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee or otherwise, be not truly stated in the policy, then and in every such case the policy shall be void." The property was insured as K's property; but before the time the policy was written, B. having borrowed \$6000 from H., had,

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instead of a mortgage, created a ground rent in his favor of \$420 *per annum*, redeemable on payment of the sum advanced, being in effect a lease for ninety-nine years. This fact was not written on the policy. B. sued at law; and the Court having decided, that he could not maintain his action on the policy unless H's interest was described in it, he dismissed his suit at law and filed a bill in equity to reform the policy, on the ground that the statement of the existence of an incumbrance on the property and the real interest of the parties intended to be insured was omitted by the inadvertence and mistake of S. agent of the appellant, and of J., B's agent, to whom, the bill alleged, the nature of H's interest was known. In their testimony S. and J. both denied all knowledge of H's interest. **HELD:**

That the relief prayed could not be granted.

APPEAL from the Circuit Court of Baltimore City.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., BOWIE, GRASON, MILLER, ALVEY, ROBINSON and IRVING, J.

*Richard M. Venable*, for the appellant.

*John K. Cowen* and *E. J. D. Cross*, for the appellee.

BOWIE, J., delivered the opinion of the Court.

The appellees, who were the complainants below, filed their bill in the Circuit Court of Baltimore City, for the reformation of a policy of fire insurance issued by the appellant, on certain property therein described as the property of the assured, alleging that material clauses were omitted by mistake, indicating the existence of incumbrances on the property, and the real interest of the parties insured or intended to be insured.

The Court below granted the prayer of the appellees, and decreed that the policy should be reformed accordingly, from which decree this appeal is taken.

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The policy purported, in consideration of the receipt of seventy-five dollars, to insure Kennedy H. Butler, and his legal representatives, twenty-five hundred dollars on property situated in Cumberland, Maryland, as therein described, including certain buildings designated by letters referring to a diagram on file, and on certain fixtures, stock, furniture and other articles enumerated in a schedule annexed, under certain provisions and conditions therein contained.

The first clause of the conditions of said policy among others provided: "If the interest of the assured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee, or otherwise, be not truly stated in this policy, \* \* \* then and in every such case this policy shall be void."

In the fourth clause it is declared: "If the interest of the assured in the property, be any other than the entire unconditional and sole ownership of the property for the use and benefit of the assured, or if the building insured stands on leased ground, it must be so represented to the company and so expressed in the written part of the policy, otherwise the policy shall be void." Neither of these conditions were complied with.

The property insured being destroyed by fire, the assured furnished proof of the loss, and that he had complied with all the conditions in said policy required, but the insurance company declined and refused to pay, alleging non-compliance with the provisions of the fourth clause above cited.

The appellees then instituted suit in a Court of law against the appellant, and that Court decided they could not maintain the action unless the interest of Henderson was described in the same.

The appellees then *non proessed* the suit at law, and filed their bill against the appellant to reform and amend the policy.

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It is alleged in the bill that Butler, being extensively engaged in the manufacture of furniture in the City of Cumberland, and desirous to raise money for the prosecution of his business, proposed to mortgage the premises described in the policy to Henderson for that purpose, but Henderson preferred the loan should be secured by the creation of a redeemable ground rent on the premises. Hence Butler, on the 14th of July, 1876, prior to the execution of the policy, by deed of bargain and sale in consideration of the sum of six thousand dollars, conveyed the fee to George Henderson, who on the same day leased the premises to Butler for ninety-nine years, renewable for ever, subject to a ground rent of \$420 per annum, payable quarterly, with the reservation of the right of re-entry to the lessor, in case of default in the payment of the rents and other covenants, and reserving to the lessee the right to redeem upon the payment of the sum of six thousand dollars and all rent then due, the lessor will release the property from the payment of the rent and give a good sufficient deed for that purpose, etc.

And the lessee covenanted, that during the continuance of the lease, he would keep the property insured in some reliable company or companies, to the amount of \$6000, and will assign the policies to the said Henderson, his heirs or assigns, for his or their benefit, in case of loss by fire.

The appellees allege in their bill, that they insured the premises in several other companies besides the appellant, and had the amount of \$6000, entered to the use of George Henderson, "but that in the policy issued by the said Farmville Insurance and Banking Company, (the appellant) said endorsement was not made, because a sufficient amount had been already assigned him."

As to the representation of the interest of the assured in the property, the bill in substance, alleges, that at the time of effecting insurance, no questions were asked by the agent of the insurers, as to the title or interest of the

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assured, that the agent, having effected insurances in several other companies of which he was the proctor, on the same property, on which policies the qualified interest of the assured was endorsed, he had actual or constructive notice of the fact, that George Henderson, Jr. had an interest in the premises.

And further, that the said fourth covenant in said policy is known as the "National Board of Underwriters' Form," and has no reference to the long leases peculiar to this State, but it is intended to embrace only short leases where the tenure of the party insured is of a short and precarious nature; and that the transaction between the insured and Henderson, was in the nature of an incumbrance or equitable mortgage, and in no manner increased the risk assumed by the insurers.

The bill further charges, that the policy of insurance in question, was effected through the agency of an insurance broker, who took out three policies therein mentioned, through the agent of said company, and when the last mentioned policy, that now in suit was negotiated, the broker of the complainants, and the agent of the company knew of the fact, that said Henderson had an interest in said property, and that said omission to enter the same on said policy, took place through the inadvertence and mistake of said broker and agent respectively.

The power of reforming or amending written contracts, upon the ground of accident or mistake, is one of the most delicate duties devolving on a Court of Chancery, and should be exercised with the utmost caution and care. It is in effect, reversing and annulling for the time, the common law rule of evidence, that a written contract shall not be altered or changed by parol, as well as those provisions of the Statute of Frauds, which require certain contracts to be evidenced by writing. In *Story's Eq. Jur.*, it is said, "relief will be granted in cases of written instruments only where there is a plain mis-

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take clearly made out by satisfactory proof." *Story's Eq. Jur.*, p. 177, sec. 157; *Gillespie vs. Moore*, 3 *John. Ch. Rep.*, 595; *Dyman vs. United Ins. Co.*, 2 *John. Ch. R.*, 630; *Henkle vs. Royal Assurance Co.*, 1 *Ves.*, 317, and other cases there cited.

This principle of equity is recognized and adopted by this Court, in several recent decisions. *Graff, et al. vs. Rohrer*, 35 *Md.*, 327; *Kearney vs. Sasscer*, 37 *Md.*, 264.

The theory upon which the jurisdiction is founded, is, that a mistake has been committed, whereby the instrument to be reformed, misrepresents the true intent of the parties. This mistake must be mutual, and the facts, necessary to prove the mistake, must be established by the clearest and plainest evidence. *Harrison vs. Harwood*, 1 *Iredell's Equity*, 407; *Brady vs. Parker*, 4 *Id.*, 430; *Bailey vs. Bailey*, 8 *Humphrey*, 230; *Dyman vs. United Ins. Co.*, 2 *Johns. Ch.*, 630; 17 *Johnson*, 373.

The omission to insert a true description of the actual ownership of the property and relative interests of Henderson and Butler therein is alleged, (as we have seen,) to have proceeded from the inadvertence and mistake of Jones and Stewart, they having full knowledge of the fact.

Mr. Jones' knowledge of the actual state of the title, is supposed to be derived from his having effected several months before, policies of insurance, upon the same property, in the Ben Franklin and Delaware State Companies, with Stewart, agent for said companies, on which were endorsed "the amount of \$625, insured under ninth item on building D, is payable, loss, if any, to George Henderson, as his interest may appear."

And Stewart's knowledge, from the fact, that as agent of those companies, he had endorsed said policies and held in his possession, diagrams delivered to him by Jones, as agent of the appellees, several months before.

In other words, that there was constructive knowledge of the facts, in the agents of each party to the policy.

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Yet, Mr. Jones testifies on his cross-examination, that he made the entries on the policy in consequence of certain instructions, received long before, relating to other policies which being cancelled, he replaced in the Ben Franklin and Delaware State policies, and had no knowledge of the lease from Henderson to Butler, until after the fire occurred.

Mr. Stewart, agent of the appellant, testified that he was also agent for several other companies, and at the time of executing the policy now in suit, nothing was said to him as to who was to receive the money, "nothing further than what was stated on the policy itself," and that at the time of underwriting the present policy, he did not know that anyone had any interest in the property insured other than the appellees.

The effect of this testimony is not qualified by anything falling from these witnesses, and they are the only persons cognizant of the facts.

They not only fail to prove the existence of inadvertence or mistake in omitting to insert Henderson's interest as lessor, and Butler's as lessee, but show they were ignorant of that relation. For it may well be assumed, if Jones, the broker, did not know of the lease until after the fire, Stewart, the insurance agent, had no knowledge of it.

The argument of the appellees, that the transaction between Butler and Henderson, was in equity a mortgage, and the fee was in the mortgagor subject to the incumbrance, does not materially affect the case, because, if the relation was such, the first and fourth conditions of the policy, require the interest to be truly stated, whether as owner, etc., or, "if the interest of the assured in the property, be any other than the entire unconditional and sole ownership, etc., it must be so represented, etc., or the policy shall be void."

The attempt to establish a usage in contradiction of this fourth provision, is contrary to the best considered



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authorities. It is elementary law, that a custom may be established by proper evidence to show the true construction of a contract, but not to control, alter and vary it. *Foley vs. Mason*, 6 *Md.*, 49, 50; *Murray vs. Spencer*, 24 *Md.*, 520; *Ches. Bank vs. Swain & Abell*, 29 *Md.*, 483.

Even if such an anomaly existed in the law, there is not evidence in this case, in our opinion, sufficient to sustain it.

The main fact necessary to give jurisdiction to a Court of equity, to reform a written contract being absent in this case, it is unnecessary to consider the other points so learnedly discussed by the counsel for the several parties in their briefs and oral arguments.

The decree below will be reversed with costs to the appellant.

*Decree reversed.*

(Decided 14th January, 1881.)

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## HENRY A. TURNER *vs.* THE STATE OF MARYLAND.

### *Construction of the Tobacco Inspection Laws.*

The appellant was indicted for violating the Tobacco Inspection Laws, in that, being a grower of tobacco, he packed a certain quantity of such tobacco in a hogshead of unknown dimensions and exported it to Bremen, without having such hogshead of tobacco inspected and passed according to the laws of this State; and in that he did not pay the outage due the State on the tobacco thus exported. On the demurrer of the appellant, it was HELD:

- 1st. That the Act of 1872, ch. 36, entitled, an Act to add a new Article to the Code of Public General Laws regulating the Inspection of Tobacco, which repealed all Acts or parts of Acts inconsistent with its provisions, did not modify or repeal sec. 41 of the Act of 1864, ch. 346, as modified by the Act of 1870, ch. 291, which constituted part of the Public Local Law; and that under that section it was the duty of the appellant to have delivered the tobacco

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packed by him, to one of the State tobacco warehouses, in order that the inspectors might ascertain whether it was packed in hogsheads of the proper dimensions, and whether it was packed in the county or neighborhood where it was grown, and marked as the statute directed.

2nd. That the charge of outrage was not in contravention of the Constitution of the United States, which prohibits any State from levying a tax on imports or exports, except so far as such tax may be absolutely necessary for the execution of its inspection laws.

3rd. That the appellant was liable to the fine imposed by the Court below, being the penalty prescribed by the Act of 1864, ch. 346, sec. 41.

APPEAL from the Criminal Court of Baltimore.

Henry A. Turner, a resident of Charles County in 1879, raised a crop of tobacco; of this crop he packed one hog-head, marked the same with his full name and place of residence and shipped it to Baltimore. On 31st August, 1880, this hoghead was exported by him to Bremen, never having been taken to the State tobacco warehouse. On 18th September, 1880, after presentment duly made by the Grand Jury in the Criminal Court of Baltimore, an indictment was found against him containing two counts, stated in the opinion of the Court.

To both of these counts demurrers were filed, on the 20th September, 1880, overruled by the Court, *pro forma*, and the traverser fined \$300.

The case is brought to this Court by a petition in the nature of a writ of error.

The case was argued before BARTOL, C. J., MILLER, ROBINSON and IRVING, J.

*E. J. D. Cross* and *J. K. Cowen*, for the appellant.

1st. There is no law requiring a compulsory inspection of tobacco grown in this State, either by the producer who

may export it upon his own account, or by a purchaser who may buy for the purpose of exportation.

A grower of tobacco in this State, before exporting the same, is not required to take it to the State warehouse for any purpose whatever.

2nd. If this be not so, and a grower of tobacco, before exporting the same, is required to take it to the State warehouse for any other purpose than inspection, and is required to pay certain charges for "outage and storage," then such law is in contravention of the Constitution of the United States.

3rd. No penalty is imposed by any law upon a grower of tobacco who marks the same with his full name and residence, and exports it without taking it to the State warehouse or paying outage or storage.

1. The laws in force regulating the inspection of tobacco are those passed in the years 1872, ch. 36, 1874, ch. 394, and 1878, ch. 386.

The Act of 1872, ch. 36, was intended as a substitute for the Act of 1864, ch. 346, as is shown from a comparison of the two Acts.

It appears from such comparison, that the Act of 1872, ch. 36, was intended to systematize and embrace all the legislation upon the subject of the inspection of tobacco.

A close examination of the sections of the Act of 1872, compared with corresponding sections in the original Act of 1864, as amended by subsequent legislation, demonstrates that the former was intended as a substitute for the latter, and that it is impossible to hold that any of the provisions of the Act of 1864 are now in force.

The two laws cannot be in force, and the latter must necessarily repeal the former. *Montell vs. Consolidation Coal Co.*, 39 Md., 164; *Stewart vs. Kahn*, 11 Wallace, 502; *The United States vs. Tynen*, 11 Wallace, 92; *Sacramento vs. Bird*, 15 Cal., 294; *Swan vs. Buck*, 40 Miss., 268; *Weeks vs. Walcott*, 15 Gray, 54; *Commonwealth vs. Kelliher*, 12 Allen, 480.

The Act of 1864, in terms, was part of Art. 4, Code of Public Local Laws, when the Act of 1872, ch. 36, entitled an Act to add a new Article to the Code of Public General Laws regulating the inspection of tobacco, was passed, and went off the statute book with its associates.

Section 41 of that Act, as amended by 1870, ch. 291, as sec. 535, Code of Public Local Laws, Art. 4, was the only section providing a penalty for exporting tobacco without inspection. It was the only then existing law forbidding the exportation of tobacco raised in this State, "except in hogsheads, which shall have been inspected, passed and marked agreeably to the provisions of this Act."

The inspection of tobacco grown in this State and exported therefrom, is therefore not compulsory, but voluntary.

The Act of 1872, ch. 36, imposes no penalty. Clearly, then, it was the legislative intent, and so must be construed, that inspection should be optional. No section of 1872, ch. 36, requires that tobacco raised in this State shall be brought to the State warehouses for any purposes whatever.

Section 41, of the Act of 1864, ch. 346, as amended by the Act of 1870, ch. 291, cannot be in force, because it imposed penalties for the doing of acts which are no longer unlawful under the Act of 1872, ch. 36, and required things be done which are now illegal. There is, therefore, no law requiring the compulsory inspection of Maryland grown tobacco, and there is no law prohibiting the exportation of such tobacco from the State without being inspected, passed or marked by State officials. The appellant, therefore, was not required by any law of this State, before exporting his tobacco, to bring the same to the State tobacco warehouses for any purpose whatever.

2. Supposing the Act of 1870, ch. 291, be held to be in force, and in no manner affected by the Act of 1872, it is

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nevertheless in contravention of Art. 1, secs. 8 and 10, of the Constitution of the United States, so far as it compels growers of tobacco to pay outage and storage charges on tobacco that is not required to be inspected before exporting the same from the State. We admit that the States may pass proper *inspection laws*, and that such laws may in effect amount to partial regulations of foreign or interstate commerce, or may impose such export duties or imposts as are absolutely necessary to enforce such inspection statutes; but the Act of 1870 levies a duty upon exports and it regulates foreign commerce, and it is not valid as an inspection law. In this case the appellant has complied with the provisions of the law in regard to the marking of his hogshead. He was a grower of tobacco in this State. He packed his tobacco in the county and neighborhood where grown. He marked his hogshead with his name in full, and the place of his residence, and when that was done the law expressly provided that the tobacco so grown and marked could be "exported or carried out of this State *without inspection*," and likewise provided that while it could be carried out of the State without inspection, it was still subject to the "same charge of outage and storage as in other cases." This law, therefore, expressly provided that the article in question should not be *inspected*, and after so providing, then required the uninspected article to pay an export duty in the shape of outage and storage. How can such an Act be defended as an inspection law which provides on its very face that the article exported may be carried out of the State without inspection, provided it pays an outage and storage tax. *Clintman vs. Northrop*, 8 Cowan, 45, 46; *State vs. Fossdick*, 21 La. An., 256; *Bouvier's Law Dic.*, "*Inspection*."

Attention is called to recent and important cases of the Supreme Court where, apparently, the necessary exercise of the police power by States has been held to fall within the inhibition of the Constitution. A State

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cannot, either by its powers of self-defence in matters of police, or by the reserved power of passing reasonable and adequate inspection laws, impose any burden on commerce. *The Cherokee Cattle Cases*, 95 *United States*, 468, 472; *Henderson vs. Mayor, &c., of New York*, 92 *Id.*, 259; *Chy Lung vs. Freeman, et al.*, 92 *Id.*, 275.

Even discrimination in rates of wharfage at a city wharf, falls under this prohibition. *Guy vs. Baltimore*, 100 *United States*, 434.

3. The judgment of the Court below imposing the fine, must in any event be reversed. The penalty referred to in the proviso of section 41 of the Act of 1864, only applies to "any person who shall carry or send out of this State any such tobacco without having it so marked." That is, without having such hogshead marked with the name in full of the owner and the place of his residence. The indictment shows that the hogshead exported by the appellant was "so marked," and hence the appellant could not be subject to the penalty prescribed by section 41. All that he can be required to do is to pay the out-  
age charge, for the non-payment of which no penalty is prescribed by the Act of 1864, or the Act of 1870. The claim, therefore, of the State would be for a simple debt, and that debt can only be recovered in a civil action.

*Charles J. M. Gwinn, Attorney-General*, for the appellee.

Under the system established by the Public Local Act of 1864, ch. 346, it was unlawful to carry out of the State, in hogsheads, any tobacco raised in the State, except in hogsheads which had been inspected, passed and marked in accordance with the provisions of that Act. The Act required the inspection of the form of each hogshead, as well as its contents. No tobacco was lawful tobacco unless packed in a hogshead of certain prescribed dimensions, to be determined by the inspection of its exterior. No tobacco was merchantable tobacco unless determined

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to be so by sampling the contents of such hogshead. When the form of the hogshead had been examined, and found to be of the prescribed description, and the full hogshead had been weighed and its gross weight marked and recorded, and when, afterwards, its contents had been sampled, the hogshead was "*passed*."

When the Act of 1864, ch. 346, was amended by the Act of 1870, ch. 291, a different state of things arose. The grower, or purchaser of tobacco, grown in the county where it was packed, was allowed to carry such tobacco out of the State, or to export it, *without having it opened for inspection*, provided such tobacco was marked with his name and place of residence. But, under the Act of 1870, ch. 291, the tobacco remained liable to the charge of outage and storage as in other cases.

Tobacco, therefore, grown in the county where it was packed, was freed only from those requirements of the Act of 1864, ch. 346, *which were incident to the opening of the hogshead*,—that is to say, from sampling, re-staying and re-conditioning. It remained subject to the requirement that the hogshead containing it should not exceed the prescribed statutory dimensions, and that its gross weight should be ascertained, and that it should be actually "*passed*" by the inspector and duly marked with its gross weight. For the particular exception, accorded to such tobacco in the earlier words in the proviso to the Act of 1870, ch. 291, from the requirements imposed upon it by the Act of 1864, ch. 346, were not enlarged by the words, "*but such tobacco, so exported, or carried out of this State without inspection, shall, &c.*" The use of the words "*so carried out of the State, without inspection,*" clearly shows that the meaning of the Legislature was—carried out of the State without *such* inspection—that is to say, without opening the hogshead for inspection. This is not only the obvious construction of the language used, but it is a construction which is required by the rules of

law governing the interpretation of statutes. The intent was particular, and the words, "so carried out of the State without inspection," must be construed to refer only to the absence of the particular inspection from which such tobacco was released. *Stradling vs. Morgan*, 1 *Plowd.*, 204; *Hawbecker vs. Hawbecker*, 43 *Md.*, 519; *Maxwell on Inter. of Stat.*, ch. 2 and ch. 3. For where general words follow particular words it is a rule that such general words must be construed as applicable to the things or persons before particularly mentioned. *Sandiman vs. Breach*, 7 *Barn. & Cress.*, 100; *Sedg. on Const. of Stats.*, 2nd *Ed.*, 361. The general words are restrained by the words to which they relate. *U. S. vs. Fisher*, 2 *Cranch S. C.*, 386, 387, MARSHALL, C. J.

In 1872, while all the provisions of the Act of 1864, ch. 346, were in force, the Legislature passed "an Act to add a new Article to the Code of Public General Laws, regulating the inspection of tobacco." 1872, ch. 36.

The whole system of laws in relation to this subject had been provided for in 1864, as it had been in 1860, by Public Local Laws, embodied in that part of the Local Code which related to the City of Baltimore.

The new Article contained no reference to such preceding legislation. It simply made the particular provisions, which are contained in its text, and concluded, (sec. 33,) by repealing only all laws, or parts of laws, inconsistent with that Act and the provisions therein contained.

The first question to be determined, is whether the Legislature in enacting this new law, intended to revise the whole subject-matter of its legislation in reference to "Tobacco," and to enact a substitute for all existing General and Local Laws upon the particular subject. *Montell vs. Consolidation Coal Company*, 39 *Md.*, 171, 172. The new Public General Act not only lacks the expression of any purpose to repeal wholly a prior Public Local Act, and confines, in terms, its repealing operation to such



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parts of the local law as are inconsistent with its provisions, but is also so expressed as to make it necessary to refer to the prior local law, in order to give completeness to the system of which the new law is a part. Under such circumstances the old and the new provisions must be so construed that they may stand together. *Montell vs. Consolidation Coal Company*, 39 Md., 169.

That this insurmountable presumption exists in the case of the Act of 1872, ch. 36, is plain from its text.

The new Act changed the measurement of the maximum hogshead, in which tobacco should be packed, by prescribing that it should not exceed fifty-four inches in the length of the staves, nor forty-six inches across the head. It provided that no tobacco of the growth of the State should be passed "*or accounted lawful tobacco*," unless the same was packed in hogsheads not exceeding these measurements; and that the owner of tobacco, packed in any hogshead of greater dimensions, or his agent, should repack the same in hogsheads of the prescribed size, at his own expense, before the same should be passed. 1872, ch. 36, sec. 26. It did not provide that each hogshead of tobacco should be numbered as it was received, and such number entered in a book with the date of its receipt; 1864, ch. 346, sec. 10; or that such hogshead should be weighed before it was encased, and the separate weights of the hogshead and tobacco ascertained; 1864, ch. 346, sec. 13; nor did it authorize, or require, the inspector to uncase the tobacco; 1864, ch. 346, sec. 15; but it assuredly recognized the power and obligation of the inspector to perform these duties, *under some other law in existence*, when it provided that such hogshead should be marked with its number, and have the gross and net weight marked with iron on the bilge. 1872, ch. 36, sec. 66. The provisions of law which it thus recognized as operative, were the provisions of the Act of 1864, ch. 346, governing such details.

Although in colonial times, and since Maryland became a State, its legislation, in reference to tobacco, has been influenced mainly by the purpose to secure the means of identifying it as the growth of the State, and to maintain its merchantable character when exported, the Act of 1872, ch. 36, made no provision whatever in relation to the exportation of unlawful tobacco,—that is to say, of tobacco packed in any hogshead of greater dimensions than those prescribed, nor in relation to carrying out of this State, in hogsheads, any tobacco grown in the State, which had not been inspected, passed and marked in accordance with the provisions of laws in existence when it was enacted.

It was not necessary that it should have done so, because these essential particulars, omitted in the new Article added to the Code of Public General Laws by the Act in question, were minutely set forth in the Code of Public Local Laws, relating to the City of Baltimore, under their proper sub-title. The new Act, according to the express terms of its 33rd section, was not intended to repeal all prior legislation upon the subject, but only such laws, or parts of laws, as were inconsistent with its own provisions. Those parts of the Public Local Law which were not inconsistent with its provisions, remained operative.

The Legislature, in enacting the Act of 1872, ch. 36, provided a large staff of officers, paid by the State, to perform the duties, which the law directed to be performed in connection with tobacco grown in the State. It placed these officers in costly warehouses, which had been built by the State in order that such officers might be better enabled to perform their duties. It fixed by law the form of the package in which tobacco grown in the State should be encased before exportation. It did all this to fix the identity and weight of tobacco alleged to have grown in this State, and thus preserve the reputation of this commodity in the markets of the world. It cannot

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be supposed that the Legislature maintained the costly equipment mainly required to secure the identity of a principal domestic staple, and yet had relinquished all control over the means of ascertaining such identity.

The purpose of the Act of 1872, ch. 36, was to select from the mass of the Public Local legislation, in relation to tobacco, certain portions, and to re-enact these in a Public General Law; and to leave the portions of the Public Local Law, which it did not thus digest, and which it neither repealed nor modified by inconsistent provisions, as existing parts of the Public Local Law. Among the provisions, which are wholly unaltered by the Act of 1872, ch. 36, were the special directions or provisions contained in secs. 10, 13 and 14 of the Act of 1864, ch. 346, and sec. 41 of the same Act, as amended by the Act of 1870, ch. 291, relating to exported tobacco.

The appellant was, therefore, properly convicted upon the first count of the indictment, if that section was not in contravention of the Constitution of the United States; for to "export" an article of commerce is to carry such article out of a country or place. *Richardson's Dict.*, word "*Export*." The words "export" and "carry out of the State" are used as phrases equivalent in meaning in the Act of 1870, ch. 291. It is admitted by the demurrer to the first count, that the hogshead in question was exported from Baltimore to Bremen in Germany, without having been delivered at a State tobacco warehouse to be weighed, passed and marked as required by law.

The Act of 1872, ch. 36, provided for the appointment of one tobacco inspector for each of the five State tobacco warehouses in the City of Baltimore. It made, as is apparent from the whole scope of the Act, such respective warehouses the places where the duties of the inspectors should be performed, with the aid of the force which they were respectively entitled to appoint to assist them in the performance of their duties as such inspectors at such warehouses. Sec. 5. *Moore vs. State*, 47 Md., 483, 484.

When officers are appointed to perform specific duties at particular places, in the examination of movable articles, and when it is required by law that such articles shall be subjected to such examination before they can be accounted lawful objects of commerce, it is plain that such articles, when intended for the uses of commerce, must be taken to the places appointed by law for their examination, and be *there* examined. 47 *Md.*, 483, 484.

It was, therefore, the duty of the appellant under the Act of 1870, ch. 291, to deliver the hogshead of tobacco in question at a State tobacco warehouse. Although under that Act, a hogshead of tobacco, grown in this State, and packed in the county, or neighborhood where it was grown, was not required to be *opened* for inspection, it was necessary that it should be ascertained, as matter of fact, that such tobacco was actually grown in the State and packed in the county or neighborhood where it was grown, and that such hogshead should be examined for the purpose of ascertaining whether it was of such dimensions as to be accounted "lawful tobacco;" 1872, ch. 36, sec. 26; and that the hogshead containing the tobacco should be numbered; 1864, ch. 346, sec. 10; 1872, ch. 346, sec. 11; and weighed; 1864, ch. 346, sec. 13; 1872, ch. 36, sec. 11; and the gross weight of the hogshead be entered in a proper book, with sufficient reference to its numbers and marks. 1864, ch. 346, sec. 13; 1872, ch. 36, sec. 15. The Act of 1870, ch. 291, did not dispense with any of these requirements. These duties could certainly only be performed by the State Inspector.

The obvious purpose and use of the precaution of weighing, under the Act of 1864, or 1870, was to afford an opportunity, at any time, of determining whether the contents of the hogshead had been diminished, or tampered with, subsequent to its original packing, by comparison of a new weighing with the original gross weight marked upon the hogshead; or, if that had been improperly

altered, with the weight of the said hogshead as originally entered in connection with its marks and warehouse number. 1864, ch. 346, sec. 10.

It was necessary that the hogshead of tobacco belonging to the appellee, should be weighed, in gross, by the proper State officer; because such weight was the standard of the charges for *outage*, payable to the State under the Act of 1872, ch. 36, sec. 20, an Act yet in force, and which modified former Acts on the same subject.

The charge of *outage* was a legal charge imposed by the State, under its system of legislation on this subject since colonial days, as a means of reimbursement, in part, for the expense which it incurred, because of the staff of officers necessarily employed by it in opening for inspection, inspecting, weighing and marking hogsheads of tobacco, grown in the State, or in examining the hogsheads in which tobacco, grown in the State, was packed, and in ascertaining that such tobacco was in truth the growth of this State.

The Acts of Assembly in controversy are not in contravention of any provision of the Federal Constitution.

The Constitution of the United States provides (Art. 1, sec. 9, sub-clause 5,) that, "No tax or duty shall be laid on articles exported from any State;" and (Art. 1, sec. 10, sub-clause 2) that, "No State shall, without the consent of the Congress, lay any imposts, or duties on imports, or exports, except what may be absolutely necessary for executing its inspection laws;" and that "The powers (10th amendment) not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

"That inspection laws may have a remote and considerable influence on commerce will not be denied; but that a power to regulate commerce is the source from which the right to pass them is derived, cannot be admitted. The object of inspection laws is to improve the

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quality of articles produced by the labor of a country ; to fit them for exportation, or it may be for domestic use. They act upon the subject before it becomes an article of foreign commerce, or commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation, which embraces everything within the territory of a State not surrendered to the general government ; all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts of this mass." *Gibbons vs. Ogden*, 9 *Wheat.*, 203, MARSHALL, C. J. ; *Hall vs. De Cuir*, 95 *U. S.*, 488.

I will venture to add to this exposition of the object of inspection laws, the further statement that they are enacted in part to afford the means of identifying articles as the growth, or production, of the industry of a particular State, and of increasing the prosperity of such State by maintaining and advancing the reputation of articles thus grown, or produced, within its territory. This particular object of inspection is well illustrated by the text of the preamble and body of the complete and admirable Statute of 1763, ch. 18, regulating the inspection of tobacco in the Province of Maryland ; *Bacon's Laws*, 763 ; and in the preamble of the Act of 1789, ch. 26, modeled upon the earlier Act, and by the text of many subsequent Acts of this State relating to tobacco.

The scope and meaning of the language used by Chief Justice MARSHALL, in *Gibbons vs. Ogden*, and especially of that part of the opinion which I have italicised, will be better understood, by reading the argument of Mr. Emmet, one of the counsel in the case, which is fully reported ; 9 *Wheat.*, 79-159 ; and especially by considering the examples, which he cites, in the note to pages 119-123 of his argument, of the exercise by States of the

power to act upon an article grown, or produced in a State, before it becomes an article of foreign, or domestic commerce, or of commerce among the States, to prepare it for such purpose. When we consider the language used by the Court, in connection with the examples of legislation in reference to inspections submitted to it in argument, we must interpret the portion of its opinion, to which we have referred, as affirming the constitutionality of legislation, which, while providing a means of ascertaining the quality of the article produced in a State, also defines the form of the lawful package, or its weight, and subjects the package as to quality and form, or quality, form and weight, to the supervision of the inspector, that he may ascertain that the required conditions of the article are entirely fulfilled.

The conclusion which must be deduced from the opinion of the Supreme Court in *Gibbons vs. Ogden*, may be aided by examples of legislation subsequent to that decision, prescribing the size, form, or weight, of packages containing articles grown or produced in any State, to the details of which the Court may readily refer. *Pennsylvania*. Beef and Pork intended for exportation, when packed, or repacked, in Philadelphia. 1 *Brightly's Purdon's Digest*, 1873, pages 157, 158; Butter and Lard, *Ibid*, 188, 189; Domestic Distilled Spirits, *Ibid*, 525; Flaxseed, *Ibid*, 708; Flour and Meal, *Ibid*, 711; Pot and Pearl ashes, 2 *Brightly's Purdon's Dig.*, 1162. *Virginia*. Tobacco, Code, 1873, pages 739, 740; Fish, *Ibid*, 750; Pitch, Tar, Turpentine, Salt, Staves, Shingles and Lumber, *Ibid*, 751. *Rhode Island*. Statutes, 1872; Beef casks, 230; Lime, 232; Fish, 233; Lumber, 236; Hoops, 238, 239; Scythe Stones, 240; Cord Wood, 249. *Maine*. Revised Stat., 1871; Lime, ch. 39. sec. 3; Pot and Pearl ashes, *Ibid*, sec. 9; Nails, *Ibid*, sec. 17; Fish, *Ibid*, ch. 40, secs. 7, 8 and 11; Cord Wood, *Ibid*, ch. 41, sec. 1; Charcoal baskets, *Ibid*, sec. 7; Packed Shingles, *Ibid*, sec. 16; Staves and

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Hoops, *secs. 18 and 19*; Beef and Pork barrels, *Ibid, ch. 38, secs. 16 and 17. Massachusetts. General Statutes, 1860*; Casks for Pickled Fish, *ch. 49, sec. 44*; Alewives, *Ibid, sec. 50*; Staves, *Ibid, sec. 85*; Hogshead Hoops, *Ibid, sec. 86*; Casks for Pot and Pearl ashes, *Ibid, sec. 167*; Kegs for Butter and Lard, *Ibid, sec. 14. Connecticut. General Statutes, 1875*; Fish barrels, *page 275, sec. 19. Vermont. General Statutes*; Beef, or Pork barrels, *page 496, sec. 6*; Staves and Hoop-poles, *Ibid, 503, sec. 63. New Jersey. Revision, 1877*; Beef and Pork barrels, *page 76*; Flour and Meal casks, *Ibid, 437*; Herring casks, *Ibid, 478. Georgia. Code, 1868*; Flour barrels, *sec. 1562*; Turpentine barrels, *Ibid, sec. 1573. Louisiana. Digest of Statutes, 1870*; Beef and Pork barrels, *page 38, sec. 28. Wisconsin. Statutes of*; Fish casks, *page 856, sec. 22. Michigan. Revised Statutes, 1846*; Beef or Pork barrels, *page 144, sec. 607*; Fish casks, *Ibid, page 148, sec. 44*; Flour barrels, *Ibid, sec. 50*; Pot and Pearl Ash casks, *Ibid, 151, sec. 74. Iowa. Code, 1873*; Shingles, *sec. 2074. South Carolina. General Statutes*; Flour barrels, *page 275*; Beef barrels, *Ibid, 279*; Staves and Shingles, *Ibid, 280. North Carolina. Battle's Revisal*; Flour barrels, *ch. 61, sec. 34, page 496*; Beef or Pork casks, *Ibid, sec. 50, page 499*; Fish barrels, *Ibid, sec. 53, page 499*; Turpentine, Tar and Pitch barrels, *Ibid, sec. 54, page 500; Tennessee. Statutes, 1871*; Butter or Lard casks, *sec. 1832*; Flour barrels, *1834. Mississippi. Statutes Laws, 1840*; Flour and Pork barrels, *page 211. Ohio. Revised Statutes, 1880*; Hogshead of Tobacco, *page 264, sec. 39*; Fish barrels, *Ibid, sec. 4300*; Spirit barrels, *sec. 4327*; Oil barrels, *sec. 4293*; Pot and Pearl Ash barrels, *sec. 4291*; Beef or Pork barrels, *sec. 4285*; Flour and Meal barrels, *sec. 4281.*

Our State legislation affords illustration of the exercise of the same power. Pot and pearl ashes, intended for exportation from Baltimore, or Georgetown, in Montgomery



County, were required to be packed in a particular manner in casks, and to be inspected and weighed. 1792, ch. 65. A similar provision was made to prevent the exportation of unmerchantable flour and unsound salted provisions from Havre de Grace by the Act of 1796, ch. 21; and from Chester by the Act of 1797, ch. 7. By the Act of 1781, ch. 12, provision was made to prevent the exportation of bread and flour, which was not merchantable, from the town of Havre de Grace. This Act was enacted for a limited time only and expired. It was revived and enacted into a permanent law by the Act of 1801, ch. 102, sec. 2, and is set forth in a note to the section last referred to in the Acts of 1801. By sec. 6 of the Act of 1801, ch. 102, the size of all flour casks brought to Baltimore Town for exportation, the character of the materials and make, the manner of hooping and nailing such hoops,—the particular length of the staves,—the diameter of the casks at the heads,—and the number of pounds of flour to be in each cask,—are each specifically prescribed. The size of laths, and the mode of packing them, was regulated by the Act of 1811, ch. 69. The number and character of hoops upon casks of ground black oak bark, exported from the port of Baltimore, was prescribed by the Act of 1821, ch. 77. The gross weight of a hogshead of tobacco, as well as its net weight, was required to be marked on the hogshead by the Act of 1789, ch. 26, sec. 21. The dimensions of the hogsheads in which tobacco was required to be packed was prescribed by sec. 35 of the Act last cited. Further illustration may be found in the following legislation: *Weighing Wheat*, 1858, ch. 256, sec. 5; *Frazier vs. Warfield*, 13 Md., 300–304; *Fish Barrels and Tierces*, *Public Local Laws*, Art. 4, sec. 309; *Flour*, *Ibid*, sec. 352; *Domestic Distilled Liquors*, *Ibid*, sec. 360.

I may certainly fairly conclude from the opinion of the Supreme Court, to which I have referred, and from the

many examples, which I have given, that the General Assembly had the constitutional power to prescribe, as it has done, the form of the package, in which tobacco, grown in this State, should be encased, and to prescribe as it has done, the agencies which shall be employed to ascertain the weight of the package; and that such power was properly exercised by the Acts to which I have referred.

ROBINSON, J., delivered the opinion of the Court.

The appellant was indicted for violating the Tobacco Inspection Laws of this State.

The first count in the indictment charges, that the appellant being a grower of tobacco, packed a certain quantity of such tobacco in a hogshead of unknown dimensions, and exported it to Bremen, Germany, without having such hogshead of tobacco inspected and passed according to the laws of this State.

In addition to these facts, the second count charges, that he did not pay the *outage* due the State on the tobacco thus exported.

To this indictment the appellant filed a demurrer, and the question on this appeal, is whether the facts thus set forth constitute an indictable offence.

This question depends: 1st, upon the construction of the several statutes of this State regulating the inspection of tobacco; and 2ndly, upon the construction of the clause in the Constitution of the United States which provides, that "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." *Art. 1, sec. 10, sub-clause 2.*

By the Code of 1860, all prior laws in regard to the inspection of tobacco were codified as part of the "Public Local Laws," under the title of "City of Baltimore," sub-title Tobacco.

These provisions of Public Local Law, were repealed by the Act of 1864, ch. 346, and certain new sections were inserted in lieu thereof.

The Act of 1864, provided for the appointment of Inspectors of Tobacco, defined their duties, and prescribed the mode and manner in which tobacco was to be inspected.

It prescribed the dimensions of the hogshead in which tobacco was to be packed, and required each hogshead of tobacco received at the State Tobacco Warehouse, to be numbered in succession as received, and provided for ascertaining the gross and net weight of each hogshead thus delivered.

Complete provision was made for the inspection of each hogshead by *sampling* after it was opened for inspection, and for staying and reconditioning unmerchantable tobacco.

It was provided that every hogshead of tobacco should be liable to a prescribed charge for *outage* in proportion to its weight, and the 41st section declared that it should "not be lawful to carry out of this State in hogsheads, any tobacco raised in this State, except in hogsheads which shall have been inspected, passed and marked agreeably to the provisions of this Act."

It will thus be seen that it was necessary in the first place, that the inspectors should examine the hogshead, to ascertain whether it was of *the dimensions required by the Act*; and in the next, that they should inspect the tobacco itself by *sampling the contents*. When this was done and the weight ascertained the hogshead was passed.

By the Act of 1870, ch. 291, the grower or purchaser of tobacco packed in the county or neighborhood, was permitted to export the same without having the hogshead opened for inspection by sampling its contents; but the Act required such hogshead to be marked with the name and residence of the owner, and to be liable for the charge

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of outrage as in other cases, and any one violating its provisions was liable to the penalty imposed by sec. 41 of the Act of 1864.

The Act of 1870, in thus permitting the grower or purchaser of tobacco packed in the county or neighborhood, to export the same without having the hogshead opened for inspection, does not dispense with any other requirement of the Act of 1864, in regard to inspection. It provides in express terms, that each hogshead thus packed shall be marked with the name and residence of the owner. and it was necessary therefore that some one should ascertain whether these requirements were complied with, and whether the tobacco was in fact the growth of the county or neighborhood where it was packed. It also required that such tobacco should be liable for the same charge of outrage as in other cases, and as the charge of outrage depended upon the weight of the hogshead, it was necessary that some one should ascertain the weight of such hogshead, in order to determine the amount to be paid. It did not change or in any manner dispense with the statutory requirements in regard to the dimensions of the hogshead in which such tobacco was to be packed, and it was necessary that some one should see that these requirements were complied with. These and other duties, it is obvious, were to be performed by the inspectors, and when performed the hogshead was to be passed and marked as provided by the Act of 1864. When the words "*such tobacco so carried out of the State without inspection,*" are read in connection with the preceding sentence, which permits the grower or purchaser to export such tobacco "without having the same opened for inspection," it is clear the term "*without inspection,*" refers to inspection by opening the hogshead and sampling the contents.

While the Act of 1864, as amended by the Act of 1870, was in force, the Legislature passed the Act of 1872, ch. 36, entitled an Act to add a new Article to the Code

of Public General Laws, regulating the Inspection of Tobacco.

This Act changes in some respects the provisions of the Act of 1864, omits others, and in express terms repeals all Acts or parts of Acts inconsistent with its provisions.

The penal clause of the Act of 1864, as amended by the Act of 1870, which made it unlawful to carry out of the State in hogsheads tobacco raised in this State, except in hogsheads inspected, passed and marked according to the provisions of the Act, is omitted in the Act of 1872. And the appellant insists, that this Act was intended as a substitute for all prior Acts on the subject; and that there is now no law in force in this State by which the inspection of tobacco is made compulsory. It seems to be well settled, that where the Legislature makes a revision of particular statutes, and passes a general statute upon the subject, and it is evident from the general framework of the statute, and the manner in which the subject-matter is dealt with, that the Legislature intended such general statute to be a complete system of legislation in regard to the matter, the statute thus passed must be considered as *a substitute for all prior laws on the subject*; and the provisions of such prior laws as are not embraced by the later statute, are thereby repealed.

It was upon this principle that the General Incorporation Act of 1868, framed by commissioners appointed in pursuance of the Constitution of 1867, was held to be *a substitute* for all prior laws in regard to corporations. *Montell & Co. vs. Consol. Coal Co.*, 39 Md., 164.

We find nothing, however, either in the title, or general framework of the Act, or in the manner in which the subject-matter is dealt with, to justify the conclusion that the Legislature intended the Act of 1872, as a substitute for all prior legislation on the subject. By the title, it merely proposes to add a new Article to the Code of General Laws regulating the inspection of tobacco.

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No reference whatever is made to prior laws, except to repeal all Acts inconsistent with its provisions. If we examine its several sections and compare them with the sections of the Act of 1864, in regard to the same matter, it is apparent, we think, the Legislature did not intend the Act of 1872, to be a revision and substitute for all prior laws regulating the inspection of tobacco. On the contrary, the provisions of such prior laws are absolutely essential to give completeness to the system of which the Act of 1872 is but a part. It does not, it is true, make it *unlawful to export* tobacco raised in this State, unless the same shall have been inspected and passed, but it does provide, that "no tobacco, the growth of this State, shall be *passed or accounted lawful tobacco*, unless the same be packed in hogsheads of certain prescribed dimensions."

It does not say in so many words, that the tobacco raised in this State, and intended for exportation, shall be delivered at one of the State Tobacco Warehouses, but it does provide for the appointment of inspectors of tobacco, clerks, and other officials, with fixed salaries, and assigns them to the tobacco warehouses, with no other duty to perform, unless it be the inspection of tobacco.

In thus declaring that no tobacco, the growth of this State, shall be accounted *lawful tobacco*, unless packed in the manner prescribed by the Act, it is plain the Legislature meant it to be the duty of the inspectors appointed by the Act, to ascertain whether such tobacco was thus packed in conformity with the requirements of the statute; and this they could not do, unless such tobacco was delivered at the State Tobacco Warehouses. The Legislature, from the earliest history of the colony, and since the formation of the State government, has made the inspection of tobacco raised in this State compulsory. To this end, the State has expended nearly a million of dollars in the erection of tobacco warehouses in the City of Baltimore, and the very Act now under consideration, and

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which it is insisted repeals such laws, appoints a large staff of officers with salaries for the purpose of inspecting tobacco. If then it had been the intention of the Act of 1872 to abandon this policy so long recognized by the State, it is but reasonable to suppose, that the Legislature would have declared such intention in plain and unambiguous terms, and not left it to be ascertained by construction and implication.

With the policy of inspection laws, whether they act as restraints on trade alike injurious to the producer and consumer, are questions for the consideration of the law-making power. Our duty is simply to declare what the law is, and the question here is, whether the Act of 1872 was intended as a substitute for all prior laws on the subject? In our opinion it was not. The Legislature meant, and only meant, to select certain provisions from the Public Local Law in relation to the inspection of tobacco, and to re-enact these in a Public General Law, and to leave such portions of the Local Law which it did not thus re-enact, and did not modify or repeal by inconsistent provisions, as existing parts of the Local Law.

The Act of 1872 did not modify or repeal sec. 41 of the Act of 1864, as modified by the Act of 1870, which constituted part of the Local Law, and under that section it was the duty of the appellant to have delivered the tobacco packed by him to one of the State tobacco warehouses, in order that the inspectors might ascertain whether it was packed in hogsheads of the proper dimensions, and whether it was packed in the county or neighborhood where it was grown, and marked as the statute directed.

And this brings us to the second question, whether the charge of *ou tage* is in contravention of the Constitution of the United States, which prohibits any State from levying a tax on imports or exports, except so far as such tax may be absolutely necessary for the execution of its

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*inspection laws.* And this question resolves itself into this, whether this charge of outage is an inspection duty within the meaning of the Constitution? If it be an inspection duty, then it is no objection to the duty itself, because it partakes of the nature of a tax on exports.

In considering the powers of a State to pass inspection laws under this clause of the Constitution, Chief Justice MARSHALL says:

"If it be a rule of interpretation to which all assent, that the exception of a particular thing from general words proves that, in the opinion of the law-giver, the thing excepted would be within the general clause had not the exception been made, we know of no reason why this general rule should not be as applicable to the Constitution as to other instruments. \* \* \* The exception was made because the tax would otherwise have been within the prohibition."

We come then to the question, whether the charge of outage is an inspection duty? It is urged on the part of the appellant, that under the Act of 1864, as modified by the Act of 1870, the only duty to be performed by the inspector in this case, was an examination of the hogs-head, to ascertain whether it was of the proper dimensions, and to ascertain further, whether it was packed by the appellant as grower in the county or neighborhood where it was grown; and that the charge of outage under such circumstances is not an inspection duty within the meaning of the Constitution.

The object of inspection laws ordinarily is to improve the quality of the productions of a country, and thereby better fit them for domestic use, or for exportation. But we are by no means prepared to concede, that the inspection must be confined to an examination of the quality of the article itself. To prepare the products of a State for exportation, it may be necessary that such products should be put in packages of a certain form, and of cer-



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tain prescribed dimensions. This may be necessary, either on account of the nature and character of such products, or to enable the State to identify the products of its own growth, and to furnish the evidence of such identification in the markets to which they are exported.

In the brief filed by the Attorney-General, he has industriously collected the several statutes of the States on this subject, and it appears from the earliest period of the government, that nearly every State has prescribed by law the size, form and weight of packages containing articles grown or produced by such States, and has made the size and weight of such packages subject to inspection. Many of these statutes are referred to by Mr. Emmet in his argument in the celebrated case of *Gibbons vs. Ogden*, 9 *Wheaton*, 120, and in delivering the opinion of the Court in that case, Chief Justice MARSHALL nowhere intimates that such statutes are not a valid exercise of legislative power.

We must conclude, therefore, that the State has the power to prescribe the dimensions of the hogshead in which tobacco raised in this State is packed, and to require such hogshead to be delivered at one of the State tobacco warehouses, in order that the inspectors may ascertain whether it conforms to the requirements of the law, and whether it is the true growth of the State, and packed by the grower or purchaser in the county or neighborhood where it was grown. And that the charge of outage, to reimburse the State for the expenses thereby incurred, and in consideration of storage of such hogshead of tobacco, is in the nature of an inspection duty within the meaning of the Constitution of the United States.

There was no error therefore in overruling the demurrer to the indictment.

The objection to the fine of three hundred dollars imposed by the Court is equally untenable. It was the duty of the appellant to have delivered the hogshead of tobacco

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mentioned in the indictment to one of the State tobacco warehouses, in order that the inspectors might ascertain whether such hogshead was of the dimensions required by the statute, and whether the tobacco was packed as required by the Act of 1870, and upon his failure to do so, the appellant was liable to the penalty prescribed by sec. 41 of the Act of 1864. It was his duty also under the Act of 1870, to mark the hogshead with his full name, but the Legislature never meant that merely marking the name of the grower or purchaser on the hogshead, released such grower or purchaser from the other requirements of the Act.

The judgment below must therefore be affirmed.

*Judgment affirmed.*

(Decided 21st January, 1881.)

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EBEN B. HUNTING vs. ADOLPHUS D. EMMART, trading as EMMART & QUARTLEY.

*Evidence not Admissible to Change the Meaning of the Acceptance of a Draft, as apparent on its Face.*

On the 25th July, 1877, L. & C. drew on H.: "you will please pay to E. & Q. \$2583, to be taken from amount of purchase money of the house purchased by you, when they have entirely completed their contract dated June 18th, 1877." Across the face H. on the 26th July, wrote: "Accepted; payable when due under the contract, out of the purchase money." At the same time E. & Q. receipted as follows: "Received of H. his acceptance of L. & C's order of \$2583, payable when due under the contract out of the purchase money of \$4500." On the 16th February, 1878, L. & C. endorsed on the draft: "The contract of E. & Q. dated June 18th, 1877, for painting, glass and glazing of nine houses on North Boundary avenue, is completed to our entire satisfaction, according to their specifications." The ac-

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ceptor refused to pay the draft, and in the action against him, he offered evidence of a contract other than that referred to on the draft, between him and the drawers, and of which the payees had no knowledge. **Held:**

That no such evidence was admissible; and that the acceptor was liable.

APPEAL from the Court of Common Pleas.

The case is stated in the opinion of the Court.

*Exceptions.*—At the trial the plaintiffs offered one prayer and the defendant offered two prayers: the substance of these prayers is stated in the opinion.

The Court (BROWN, J.,) granted the plaintiffs' prayer and refused the defendant's prayers; the defendant excepted, and the verdict and judgment being for the plaintiffs, the defendant appealed.

The cause was argued before BOWIE, GRASON, MILLER, ROBINSON and IRVING, J.

*L. M. Reynolds* and *Orville Horwitz*, for the appellant.

The Court below erred in not allowing the defendant to prove the existence of the contract of purchase of the house in question; by the very terms of the draft itself, the amount agreed to be paid was to be paid out of the purchase money of the house, when due under the contract, and it was, therefore, competent, in the first instance, to show whether anything was due under the contract.

The very moment the attention of the Court was drawn to the fact that another contract was in existence besides the contract between the plaintiffs and Locke & Conway, it created such a latent ambiguity as authorized the introduction of the proposed evidence. 2 *Parsons on Contracts*, 557.

The plaintiffs' prayer proceeds on the hypothesis that the acceptance, on its face, shows that the amount named

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in it was payable absolutely by Hunting, the defendant, on the completion of the work by Emmart & Quartley, whether he owed a farthing to Locke & Conway, under his contract of purchase, or not. The defendant insists that this is not the true construction of the contract of acceptance. His prayers are framed in accordance with the theory that the acceptance, by its very terms, points to another and a different contract, and that it was incumbent on the plaintiffs to show that the purchase money for the house had become payable.

*J. W. Denny* and *S. T. Wallis*, for the appellees.

By the terms of the draft and acceptance, construed either with or without reference to the receipt produced by the appellant, the appellant became bound to pay the amount of the acceptance to the appellees, upon the completion of the contract of the latter with Locke & Conway, which is recited in the draft. This last named contract is designated, in words, in the draft, and no other contract is described or specified, in draft, acceptance or receipt. Anderson, the agent of the appellees, who presented the draft, received the acceptance, and gave the receipt on part of appellees, testified on cross-examination, in answer to the appellant's own question, that no other contract than that mentioned in the draft was alluded to by appellant in the transaction, and that he, Anderson, had no knowledge, at the time he gave the receipt, of the existence of any other contract, and never heard of any, until appellant, long after appellees had done their work, said, that "he also had a contract," and under color of that, repudiated his obligation to pay.

The appellees, as the proof shows, would not close their contract with Locke & Conway, until they had first made direct application to Hunting, to ascertain whether he would give the acceptance tendered by Locke & Conway, and Hunting had actually given it. They did their whole

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work on the faith of that acceptance. If Hunting intended the acceptance to be payable, not upon the completion, by appellees, of the contract named in the draft, but on the fulfillment of another and different contract between Locke & Conway and himself, to be performed by Locke & Conway, it was his plain duty, in common honesty, to say so to the appellees, and not, by a trick or contrivance of unexplained words, to induce the latter to expend their labor and materials upon a job, for which their payment was to depend, without their knowledge, upon a contingency altogether apart from their own faithful performance of their duty. To construe the words, "the contract," inserted by appellant in the acceptance and receipt, as referring to some other unnamed contract, different from that which was designated in the draft and was in the contemplation of the payees, would be to assist the appellant in the commission of a plain fraud. The fact that the money drawn for was to be paid "from amount of the purchase of the house purchased by you," (appellant) gave appellees no notice whatever of any dependence of their money upon the contingencies of any unfulfilled contract of purchase and sale. On the contrary, the acceptance of the draft drawn was a distinct admission that the appellant had purchased a house from Locke & Conway, and owed them purchase money for it, out of which he agreed to pay the appellees, when their work should be completed. He estopped himself from denying that he had purchase money enough to meet the draft, and from setting up anything to the contrary of its sufficiency to pay the draft. His acceptance amounted to saying: "I have bought a house from Locke & Conway, and when your work is satisfactorily completed, I will pay you out of the purchase money as they request."

So much for the case, on the face of the papers, aided only by Anderson's evidence, (produced by appellant) that no contract but that of the appellees and Locke &

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Conway was mentioned by appellant, or known to Anderson, when the draft was accepted and the receipt was given.

But the appellees, on cross-examination, gave other proof by Anderson. He was asked to explain the meaning of the words of his own receipt, viz., "when due, under the contract, out of the purchase money of \$4500." He answered that he understood it to mean when he signed it, "that there was so much money due, by defendant, to Locke & Conway, out of which defendant was to pay the amount of the draft to plaintiffs, when due to plaintiffs, under their contract with Locke & Conway." "The word 'contract' in his receipt, referred, 'he added,' to the contract between plaintiffs and Locke & Conway."

In this state of the case, on the face of the papers and the extrinsic proof, what was the offer of the appellant? He tendered in evidence a building-mortgage between Michael Roche and himself, assigned by Roche to Locke & Conway, "as the contract referred to in his acceptance," and "proposed to follow it up with proof that nothing had at any time become due and payable to Locke & Conway thereunder." The appellees objected to the testimony and it was rejected.

It will be observed that appellant did not offer or propose to offer any proof to contradict the evidence already in, or, in any way to connect the papers which he offered, with the appellees, or the transaction to which the appellees were party. There was no proof tendered or proposed to be given, to show that the appellees knew of the existence of the building-mortgage, or of the terms of the purchase, out of the money payable for which, the draft was to be satisfied. Anderson had proved that the appellant, pending the work of the appellees, had promised to pay the draft when the work should be completed, and after the work had been entirely completed, again promised to pay it, asking only a little time. None of

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this was sought to be impeached, and the introduction of the building-mortgage was not proposed to be followed up by any evidence denying it. There is no legal ground, upon which the testimony so offered could be admissible.

The case of the appellant is substantially this: "I got you to paint my houses under an acceptance, which seemed, and which you understood, to be a promise to pay you, when your own work should be completed. I did not mean that, however. I had a private contract with Locke & Conway, of which you knew nothing, and which I carefully concealed from you. Availing myself of your ignorance, I worded my acceptance and receipt so as to enable me to contend that your pay was to be dependent, not on the completion of your own contract, as you supposed, but on the fulfilment of that of Locke & Conway, of which you knew nothing, and of which I gave you no notice. Not only that, but while you were going on, in good faith, painting my houses, I quickened your work by promising to pay you when it was done, and by holding out to you the inducement that the sooner you finished, the sooner I would pay you. You accordingly finished the work to my entire satisfaction, and I then again promised to pay you. Having thus got the whole of your work and material for my benefit and advantage, under false pretences, I now propose to prove the existence of my contract with Locke & Conway, which I concealed from you, and to insist that I owe you nothing, because those gentlemen are in default under it."

It was in aid of this proposition of legal and moral ethics that the evidence rejected was sought to be introduced, and the prayers of the appellant were presented.

BOWIE, J., delivered the opinion of the Court.

The question presented by this appeal is, the proper construction of the acceptance of a draft drawn by Messrs. Locke & Conway, in favor of the appellees, on the appellant, and accepted by him.

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At the trial below, the appellees (being the plaintiffs) produced and proved by competent evidence, the draft, and acceptance, and endorsement on the draft, of the tenor and effect following, viz.,

BALTIMORE, *July 25th*, 1877.

E. B. Hunting, will please pay to Emmart & Quartley, twenty-five hundred and eighty-three dollars, to be taken from amount of purchase money of the house purchased by you, when they have entirely completed their contract, dated June 18th, 1877.

\$2583.00.

LOCKE & CONWAY.

Across the face of the foregoing draft is the following, to wit:

"Accepted: payable when due under the contract, out of the purchase money.

"Baltimore, July 26th, 1877. E. B. HUNTING."

Subsequently there was endorsed on the back of the foregoing draft the following, viz.,

"The contract of Emmart & Quartley, dated June 18th, 1877, for painting, glass and glazing of nine houses on North Boundary avenue, is completed to our entire satisfaction, according to their specifications.

"Baltimore, February 16th, 1878. LOCKE & CONWAY."

The execution of which was also proved.

The appellees further proved by competent evidence, the original contract, between the drawers and payees of the draft, dated the 18th June, 1877, for painting and glazing nine marble front houses on Boundary avenue, and the completion of the work as therein stipulated, and that before the contract was entered into, the drawers of the draft had offered to secure the drawees, by a draft on the appellant; who, was waited on by the foreman of the appellees, to know whether he would accept it, and did



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accept it in the form aforesaid, and delivered it to the foreman, who delivered it to the appellees.

That during the prosecution of the work, the appellant, being requested to make some advances on his acceptance, refused, but said he would pay when the work was done, that he urged the appellees to complete the work, the sooner it was done, the sooner they would get their money; that after the work was completed and certified by Locke & Conway, as aforesaid on the draft, the appellant promised to pay the draft after a short time, etc., and finally he refused, saying he had a contract with Locke & Conway, and he owed nothing under the contract.

On cross-examination, the witness admitted having given the following receipt:

BALTIMORE, *July 26, 1877.*

Received of E. B. Hunting his acceptance of Locke & Conway's order of \$2583, payable when due under the contract, out of the purchase money of \$4500.

EMMART & QUARTLEY,  
*per Anderson.*

Witness said, that when the defendant drew this receipt, and handed it to him for his signature, he told defendant, it was unusual and unnecessary to give a receipt for the acceptance of a draft; defendant replied it was necessary to show that he had made himself responsible for the amount of the draft; witness then signed the receipt, and the defendant handed him the draft with the acceptance thereon. Being further cross-examined as to his statement in chief, that he had never heard from defendant of any contract, but that of the plaintiffs with Locke & Conway, until defendant, after the work was finished, finally refused to pay the draft, as he had testified in chief, and being asked in that connection what he understood by the words of his own receipt, "when

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due under the contract, out of the purchase money of \$4500," he said, that as he understood it when he signed it, there was so much money due by defendant to Locke & Conway, out of which defendant was to pay the amount of the draft to plaintiffs under their contract with Locke & Conway; no other contract than that between Locke & Conway and plaintiffs, was alluded to by the defendant at that time, or known to witness, etc.

The appellant, then offered in evidence certain papers, following:

1st. A mortgage dated the 19th of February, 1877, from Michael Roche to E. B. Hunting, reciting a lease from Hunting and wife to Roche of certain lots of ground, and that Roche covenanted to build certain houses thereon, and Hunting agreed to advance Roche \$12,000 in money and building materials; to constitute a lien on the houses, in satisfaction of part of which on the compliance with the covenants of the mortgagor in all respects, so as to exempt from liability under the mechanics' lien laws of Maryland, the mortgagee, Hunting, agreed to purchase one of the houses, at the price of \$7500, \$3000 whereof to be credited on the mortgage, and pay the balance of \$4500 in cash. The appellant in his brief says: "It further appears, that the said Roche assigned *his contract of leasing* to Locke & Conway, and that they proceeded to build the houses in question."

The defendant's counsel stated, that he offered these papers, on the part of the defendant, "*as the contract referred to in his acceptance aforesaid,*" and proposed to follow it with proof, that nothing had at any time become due and payable to Locke & Conway thereunder; but the plaintiffs objected, and urged that the defendant should not be allowed to read the papers to the jury, and to follow it up with the evidence proposed, which objection the Court sustained; to which ruling the defendant excepted, which constitutes his first bill of exceptions.

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The testimony having been closed, the plaintiffs submitted one prayer, which was granted, and the defendant two, which were refused, to which ruling of the Court, the defendant also excepted, making his second bill of exceptions. The exclusion of the testimony, and the granting and refusal of the prayers, present substantially the same questions, and will be considered together.

The theory of the plaintiffs is, that by the true construction of the order and acceptance offered in evidence, the plaintiffs were entitled to receive the amount therein set forth, upon the entire fulfilment of their contract of June 18th, 1877, with Locke & Conway.

The defendant's contention is, that the plaintiffs are not entitled to recover, unless they have satisfied the Court and jury by proper and competent evidence, that the defendant was bound (under his contract of purchase of the house named in said draft to have been purchased by him) to pay the purchase money of \$4500, at the date of the institution of the suit.

The plaintiffs' proposition is, that the acceptance on its face, shows that the amount named in the draft was payable unconditionally by the acceptor, on the completion of the work by Emmart & Quartley, under their contract dated June 18th, 1877.

It is the province and duty of the Court to construe all contracts offered in evidence, without the aid of extrinsic evidence, unless there is in their terms some ambiguity creating doubt as to their meaning, or unless the words were used in some technical or peculiar sense.

This is not an attempt to alter or change a written contract by parol evidence directly, but to change the meaning of the acceptance of the draft, by introducing evidence of other contracts between the acceptor and drawers of the draft, made long before, and of which the payees had no knowledge. To apply the language of the draft to a subject-matter, not within the contemplation of the drawers

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and payees, when the draft was drawn or accepted. The draft and acceptance written on the same paper, constitute the contract. The draft is clear, certain and definite in every particular, the sum to be paid, the funds, the payees and the time, viz., "*when they have entirely completed their contract dated June 18th, 1877.*" The acceptance in connection, and as responsive to the draft, is unequivocal and free from all doubt. In technical terms, the *aggregatio mentium* and *consensus ad idem* are both complete. Put in the form of question and answer, the transaction may be thus paraphrased. Q. Will you pay \$2583 out of the purchase money of house bought of us, to Emmart & Quartley, when they have completed their contract of 18 June, 1877. Ans. I will.

Besides the acceptance, the defendant drew out on cross-examination of the plaintiffs' foreman, that when he got the acceptance of the defendant, he was required to give a receipt for the acceptance, "to show that the defendant, had made himself responsible to the plaintiffs for the amount of the draft." This receipt, executed at the same time with the acceptance, is couched in the same terms as respects the time of payment, as the acceptance, using the identical words "payable when due under the contract, out of the purchase money," adding "of \$4500" at the end.

There is nothing in any contemporaneous paper comparing the draft, acceptance and receipt, and considering them as constituting one transaction, to create a doubt, as to the meaning of the contract. There is no ambiguity, *patens* or *latens*.

But the defendant insists, the true construction of the acceptance is, that the draft was payable out of the purchase money when the money was due under the contract for the purchase of the house, under the contract between the acceptor and Locke & Conway.

And to show that there is nothing due from himself to Messrs. Locke & Conway, he offered in evidence the mortgage and other papers referred to in the record. There

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was no privity of contract between the plaintiffs and the defendant, in relation to the mortgage; or between the plaintiffs and Locke & Conway. The contract between the defendant and Locke & Conway, was entirely extraneous and independent, and after the repeated verbal assurances of the defendant, that he would pay the draft, when the painting and glazing were done by the plaintiffs, it would have been the grossest injustice, to allow him to make equivocal, certain terms, under pretext that they were susceptible of a double sense, and to introduce evidence of an entirely distinct contract of which the plaintiffs had no knowledge.

This would not be to explain a latent ambiguity, by evidence of collateral matter, but to create one, and substitute one subject for another.

It is impossible without violence to all rules of construction, to ignore the time of payment, and the identity of the contract, contained in the last words of the draft, viz., "when they have entirely completed their contract, dated June 18, 1877."

The general rules as to the admission of parol evidence to explain latent ambiguities, are too familiar to require citation. Some difficulty occasionally arises in their application, but the doctrine is well established, that as a general rule, written instruments are to be construed by the Court alone, according to the meaning of the language therein employed, without the aid of parol proof to explain the meaning and intention of the parties, unless, the terms of the instrument are technical or equivocal on its face, or are made so by reference to extraneous circumstances. *Williams vs. Woods, Bridges & Co.*, 16 Md., 220; *Creamer vs. Stephenson*, 15 Md., 211; *Warner vs. Miltenberger*, 21 Md., 264.

Finding no error in the rulings of the Court below the judgment will be affirmed.

*Judgment affirmed.*

(Decided 21st January, 1881.)

SARAH WILSON *vs.* JAMES McCARTY, Surviving Executor of EDWARD McCARTY.

*Jurisdiction of the Orphans' Court to enquire into Administration Accounts—Laches—Distribution—Code, Art. 93, secs. 138–143 and 230–231.*

So long as assets can be found which properly belong to the estate of a decedent which have not been brought in and accounted for, the estate is not fully closed, and the Orphans' Court on proper application has jurisdiction to compel a surviving executor to return such assets, or recover them when they can be recovered, even where an account, called final, had been passed and some fourteen years had elapsed since such account.

The Orphans' Court has jurisdiction to correct an account within a reasonable time, which depends upon the peculiar circumstances of each case and the character of the correction to be made.

Where the petitioner to the Orphans' Court to have the accounts of a surviving executor enquired into, fourteen years after the passage of a final account, was a married woman when the accounts were passed and distribution made, no *laches* can be imputed to her in respect to the time of her petition filed within fifteen months after becoming a widow.

To make a distribution an entire protection to an executor or administrator, it is necessary that such action be taken and such notice be given as the Code, Art. 93, secs. 138–143, provides to justify the Orphans' Court in making it.

The Orphans' Court under Art. 93, secs. 230–231, of the Code, has authority on application, to determine who are the next of kin, for the purposes of distribution.

APPEAL from the Orphans' Court of Allegany County.

The case is stated in the opinion of the Court.

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Wilson *vs.* McCarty, Surv. Ex'r.

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The cause was argued before BARTOL, C. J., BOWIE, MILLER, ROBINSON and IRVING, J., for the appellee and submitted on brief for the appellant.

*D. Jas. Blackiston* and *Jas. E. Ellegood*, for the appellant.

*A. Beall McKaig*, for the appellee.

IRVING, J., delivered the opinion of the Court.

The petition of Sarah Wilson, filed in the Orphans' Court of Allegany County, on the 18th of May, 1880, set forth that she was the daughter and heir-at-law of Edward McCarty, deceased, who died in 1849, possessed of large real and personal property, leaving a will by which Isaac McCarty and James McCarty were appointed executors. It alleges that these executors accepted the trust, and took charge of the estate; that one of them, Isaac McCarty is dead, but that James McCarty still lives. The petition further states, that petitioner pending the administration, to wit: in 1852, married one Robert C. Wilson who died in February, 1879, leaving her a widow; and she is now unmarried. The petition charges that the executors passed sundry accounts of their administration, to which reference is made; but that there has never been a full and complete settlement of the estate by the executors or the survivor of them; and that a large amount of debts still remains due the estate, and a large amount of personal chattels unaccounted for. The petition further charges that on the thirty-first day of October, 1854, the executors charged themselves with \$30,176,48, which were distributed, but that no part thereof was distributed to the petitioner, although she was entitled to a share of the same. The petition prays that the surviving executor may be required to make a full and particular account of the administration, that there may be a true and correct dis-

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tribution, and for further relief. The surviving executor was cited to answer this petition, and show cause why its prayer should not be granted. In his answer he admits the relationship of the petitioner to the testator, and that respondent is the surviving executor of the testator as alleged; but he avers that he has complied with all the requirements of law about the estate, and paid away the estate to those who were supposed to be entitled thereto according to the directions of the Orphans' Court; and that in 1866, in September, he passed a final account, by which it appears, that he had overpaid the estate the sum of \$226.72, which had never been refunded to him. The answer denies that there are large debts due the estate unaccounted for, and a large amount of personal chattels belonging to the estate which have not been accounted for. It insists, that the estate has been fully closed by the passage and approval by the Court of the ninth administration account. It denies the jurisdiction of the Orphans' Court to require him to answer the petition, as their citation and order did, or to require from him any further account of the estate whatever.

The case seems to have been heard on bill and answer, and the Court, on 18th of June, 1880, passed an order in which they say: "The Court being of opinion, that they have no jurisdiction to examine into and correct the eighth administration account, are likewise of opinion, that they cannot hear any evidence in the matter of this petition, to show assets in the hands of the defendant unaccounted for or unadministered, and must therefore dismiss the petition *for want of jurisdiction* as to this case." From this order this appeal has been taken.

It appears that the Court has acted wholly on the theory, that no jurisdiction rested in that body to compel the executor to return additional assets which might be in his hands, or to take steps to collect any that existed and had not been collected and returned. It is clear that



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the setting down of the case, on bill and answer, was merely to try the question of jurisdiction raised by the answer. It was the plea to the jurisdiction which the answer interposed, which was heard and determined adversely to the appellant. It is evident that the appellant tendered herself ready to sustain the allegations of the petition by proof; for the Court says they "*can hear no proof in the matter of the petition to show assets in the hands of the defendant.*"

So long as assets can be found, which properly belong to the estate of the decedent, which have not been brought in and accounted for, the estate is not fully closed. If the executors were both dead, on suggestion to the Court, that such assets existed, the Orphans' Court would at once appoint an administrator *de bonis non* to do what was necessary to be done to collect and account for such assets. *Salisbury vs. Black*, 6 H. & J., 297; *Hazlett vs. Green*, 7 H. & J., 23; *Scott vs. Fox*, 14 Md., 388; *Cecil vs. Clark*, 17 Md., 520, and *Neal vs. Charlton*, 52 Md., 495.

In the case now before us one of the executors still lives, and the trust has survived. If, therefore, there be assets which he has not returned, or assets which can be recovered, which he has not recovered, it is not only within the power and jurisdiction of the Orphans' Court to require the executor to discharge his duty, but it is the plain duty of that Court to compel him. This jurisdiction is expressly conferred by the statute. See *Rev. Code, Art. 50. secs. 5, 6, 14 and 15.*

The cases of *Jones vs. Sothoron*, 10 G. & J., 187, and *Binnerman vs. Weaver*, 8 Md., 517, upon which the Orphans' Court relied, as establishing its lack of jurisdiction in the premises, are not applicable to a case like this. In *Jones vs. Sothoron*, the property giving rise to the contention consisted of negroes, which had been distributed and actually handed over to the claimants; and this Court only decided that delivery of specific property

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having been made to the distributees, the Orphans' Court could not compel a re-delivery of the specific property to the executor or administrator for the purpose of new distribution. The Orphans' Court in such case could not enforce a change of possession, and a Court of equity had to be invoked. The case of *Binnerman vs. Weaver*, is not more in point. In that case the Court was not called on to consider a question like the one now before us. There the Court only decided that the Orphans' Court had no power to control or enforce a trust created by will.

If other assets were actually in the executor's hands, which he failed to return, or existed, and he had not recovered them, the executor, by passing an account, and calling it a final account, could not preclude inquiry by the Orphans' Court, on proper application, whether he had returned all the assets, and fully discharged his duty in that Court. Even if he, and the Court supposed, when that account was passed, that there were no other assets, the subsequent discovery of them would impose a duty on the executor or administrator, to collect, return, and pass another account, and the Court on proper information should compel him to do so.

Respecting the application to correct the accounts already passed, and the distribution made, we need only say, that the jurisdiction of the Orphans' Court, to correct an account within reasonable time, has been frequently upheld in this Court. What is reasonable time, depends upon the peculiar circumstances of each case, and the character of the correction to be made. *Scott vs. Fox*, 14 Md., 388; *James Stratton's Case*, 46 Md., 559; *Bantz vs. Bantz*, 52 Md., 686. In *Scott vs. Fox*, 14 Md., 388, this Court said: "it is a principle, settled beyond all doubt, that administration accounts are only *prima facie* correct. Their *ex parte* character imperiously requires they should be so. Errors in them have been repeatedly corrected, when made to appear in Courts of law or equity." In

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that case an administratrix had passed an account charging herself with the inventory of the estate, according to the appraisement, and all other assets apparently, and claimed credit for debts paid, &c., leaving a balance due the estate. Subsequently she passed a second account, in which she charged herself with this balance, and after claiming credit for costs of administration, she also claimed credit for her own share of the estate, and for payments made to the several children for their shares of the estate in full, except as to one, for which she claimed credit for money deposited in bank to his credit. This account, which was in itself a distribution, was duly passed and approved. This administratrix died, and seven years afterwards application was made to the Orphans' Court for letters *de bonis non*, on the ground, that it appeared by the accounts that the administratrix had taken the personal property at the appraisement, (which was mainly composed of negroes) and that no order of the Orphans' Court was of record, authorizing her to take at the appraisement. It was in proof, that verbally the Court had so directed and authorized her to do. It was claimed that this property had not been administered. The Orphans' Court refused the letters; but this Court reversed that order, and after saying that such verbal authority from the Orphans' Court conferred no right on the administratrix to do as she did, said, "a failure to appeal, within thirty days from the passage of that account, will not have the effect to prohibit an administrator *de bonis non*, from obtaining the correction of any errors which may have been committed in the former administration." If an error of that character could be corrected through administration *de bonis non*, when the administratrix was dead, it is clear, that errors of an executor or administrator in omitting to charge himself with all the assets in his hands, may be inquired into, and corrected in his life-time. The exact particu-

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lars, wherein correction is sought, are not disclosed in the petition, and we are, therefore, unable to say whether the particular correction which is desired may be made. We ought, however, to add that the appellant having been a married woman when these accounts were passed, and distribution made, was not *sui juris*, and, therefore, no *lashes* can be imputed to her in respect to the time of her complaint.

Respecting the question of correcting the distribution heretofore made, we are unable to pronounce definitely, for there appears to be a will, which is not incorporated in the record. It may be that a question of construction is involved, which may require resort to another forum. We may, and ought to say, however, that so far as the record discloses, the distribution appears to be the act of the executor alone. No proceedings are alleged, or certified to have been taken under secs. 138, 139 and 143 of the Code, Art. 93, so as to make the distribution the act of the Court, which would protect the executor, unless appealed from and reversed. To make a distribution an entire protection to an executor or administrator, it is necessary that such action be taken, and such notice be given, as the statute provides, to justify the Court in making it. This is distinctly decided in *Conner vs. Ogle*, 4 Md. Chancery Decisions, in *Hansen vs. Worthington*, 12 Md., 418, and in *Scott vs. Fox*, already cited. It is also decided in *Craufurd vs. Craufurd*, 22 Md., 465, that the Orphans' Court under secs. 230 and 231 of Art. 93, have the authority, on application, to determine who are the next of kin for the purposes of distribution. It does not appear, however, that this was a case of such inquiry, or that such action by the Court was ever invoked; nor that such will be the inquiry on the remand of this case. Upon the remand of the cause, all these questions will be open in the Orphans' Court. We decide nothing on this appeal but the question of jurisdiction, so far as the

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record enables us to do so. The meagre presentation of the case in the record prevents our going further, if other questions could really be regarded as before us.

*Order reversed, and  
cause remanded.*

Decided 21st January, 1881.)

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JAMES POLLARD, Administrator d. b. n. of MARGARET LARSH *vs.* JULIA V. MOHLER, by her husband and next friend ISAAC W. MOHLER.

*Renunciation of the Right of Administration—Art. 93, secs. 17-33, of the Code—Issues to a Court of Law.*

In November, 1879, letters *d. b. n.* were granted to P. on the estate of L., fifty years after letters of administration were first granted. An inventory was in the same month returned by P. and in the following month M. petitioned the Orphans' Court, alleging that she was a grand-daughter of L. and entitled to letters, and prayed that those granted P. be revoked. P. alleged in answer, that M. and all other heirs and personal representatives had waived their rights of administration and directed him to administer, and that he had nearly completed the settlement of the estate. There was no written renunciation. P. also prayed for an issue among others, to a Court of law, as to whether M. had renounced any right she might have to administer. **HELD:**

- 1st. That M. was not entitled to have the letters granted to P. revoked.
- 2nd. That P. was entitled to have the issue sent to a Court of law for trial, though the question involved might have been decided by the Orphans' Court.

APPEAL from the Orphans' Court of Baltimore City.

The case is stated in the opinion of the Court.

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The cause was argued before BARTOL, C. J., MILLER, ALVEY, ROBINSON and IRVING, J.

*Charles J. Bonaparte*, for the appellant.

Nothing in the language of Art. 93, sec. 38, of the Code of 1860, (Art. 50, sec. 96, of the Revised Code,) requires this Court to hold the method of renunciation therein prescribed *exclusive* of all others. The natural reading is that it only affords *certain* means of avoiding the responsibilities of executor or administrator to one wishing to decline them. The Court *must not* appoint a person entitled who "delivers or transmits" the required declaration. *Non constat* that it *must* appoint such a person when he renounces in some other manner. And in fact, this Court has held that various other methods of renunciation or disqualification are effective. *Ward vs. Thompson*, 6 G. & J., 349; *Maurer vs. Naill*, 5 Md., 324; *Edelen vs. Edelen*, 11 Md., 416; *Edwards vs. Bruce*, 8 Md., 387; *Thornton vs. Winston*, 4 Leigh, 152, (adopted 14 Md., 106, and 44 Md., 630;) *Gaddy vs. Butler*, 3 Munf., (Va.,) 345, (approved 4 Leigh, 152.)

If any act other than a written renunciation filed in Court can disqualify or estop the appellees from claiming the administration they are estopped here.

By their *laches* in not filing their application to revoke until December 17th, although the letters were granted on November 19th, with their full and previous knowledge, and while they resided in the City of Baltimore. *Edwards vs. Bruce*, *supra*; *Lefever vs. Lefever*, 6 Md., 472; *Clagett vs. Hawkins*, 11 Md., 381; *Burnley vs. Duke*, 1 Rand. (Va.,) 108.

By their further *laches* in not applying for administration *d. b. n.* during a period of well nigh fifty years. *Marr vs. Peay*, 2 Murph. (N. C.,) 85; *Stocksdale vs. Conaway*, 14 Md., 99, pages 106, 107; *Nelson vs. Jarrington*, 4 Munf. (Va.,) 332.

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By their deliberate agreement not to apply, made for a valuable consideration, binding both in law and in morals, and when sought to be annulled, almost entirely executed. *Bassett vs. Miller*, 8 *Md.*, 548.

By the unquestioned principle of estoppel *in pais*, forbidding one to profit by his own wrong in repudiating the consequences of his own voluntary and intelligent action. *Bigelow on Estoppel*, p. 345; *Bramble, et al. vs. State, use of Twilley*. 41 *Md.*, 435; *Md. Fire Ins. Co. vs. Gusdorf*, 43 *Md.*, 506; *Nelson vs. Carrington*, *supra*; *Burnley vs. Duke*, *supra*.

If the Court below was right in revoking the appellant's letters, it was because they were granted without proper notice or summons to the person or persons best entitled, and without his or their binding renunciation. Upon the appellee's own theory, therefore, the Court, after revoking the letters thus "inadvertently granted," should have summoned all the parties entitled to administer under the Code, and have granted letters to the one or more best entitled among them. *Thomas vs. Knighton*, 23 *Md.*, 318.

*Edward O. Hinkley*, for the appellee.

*Cook vs. Carr*, 19 *Md.*, 1, decides that the Orphans' Court "has neither jurisdiction nor power to deprive" one, who is entitled to administration, of that right.

In *Owings vs. Owings*, 1 *H. & G.*, 492, the Court commented on agreements for transfer of the right to administer.

The policy of our testamentary law certainly is to require a definite mode of deprivation, viz., summons or written renunciation. *Code*, Art. 93, secs. 31, 33, 38; amended by 1874, ch. 402; *Revised Code*, Art. 50, secs. 91, 93, 96; 1798, ch. 101, sub-ch. 5, secs. 7, 23, and sub-ch. 14, sec. 1. See *Hoffman vs. Gold*, 8 *Gill & J.*, 79; *Carpenter vs. Jones*, 44 *Md.*, 628; *Nusz vs. Grove*, 27 *Md.*, 401;

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*Kearney vs. Turner*, 28 Md., 425 ; *Young, Ex parte*, 8 Gill, 286.

As to the right of petitioner to a day in Court, *Thomas vs. Knighton*, 23 Md., 319, would seem to be quite conclusive. The argument that there may be a waiver of the right of administration, or a consent that another should act without any act in Court, is directly against Art. 50, sec. 91, of the Revised Code ; and if any evidence is to be adduced to show that a party entitled is willing to decline the trust, that also must be delivered or transmitted to the Orphans' Court. It is another method of appearing in Court ; but still it is "a day in Court." Nothing else will do, but a judicial sentence of deprivation of the right. The Code itself fixes the method, by which only a party may be deprived, and none other can be admitted.

The further formality of "a declaration in writing," is within the power of the legislative body to prescribe, and is intended as an additional safeguard.

ROBINSON, J., delivered the opinion of the Court.

On the 22nd of April, 1829, letters of administration were granted to Silas Larsh, on the estate of Margaret Larsh, deceased.

On the 19th of November, 1879, more than *fifty years* thereafter, letters of administration *de bonis non*, were granted to the appellant, and on the 29th of the same month, an inventory of the unadministered assets belonging to the estate was returned by the administrator *d. b. n.* to the Orphans' Court of Baltimore City.

On the 17th of December, 1879, a petition was filed in the Orphans' Court by Julia V. Mohler, the appellee, by her husband and next friend, alleging that she is a granddaughter of Margaret Larsh, deceased, and as such, entitled to letters on said estate, and praying that the letters theretofore granted to the appellant be revoked.

In reply to this petition, the appellant alleges that the said Julia V. Mohler, and all other heirs and personal repre



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sentatives, agreed to waive and did waive their respective rights of administration on the estate in question, and directed him to administer on said estate, and in their place and stead to do all things pertaining to such office. That this agreement was assented to and confirmed by the husband of the appellee, and that in pursuance of said agreement, waiver and request, and for no other reason, he undertook and assumed the duties of said office, and did much labor about the same, and has now nearly completed said administration, whereby he and others have acquired rights, which may and would be lost if his letters are now revoked.

At the same time the appellant prayed that issues might be sent to a Court of law for trial, to determine among other things.

“Whether Julia V. Mohler, the appellee, has renounced or waived any right which she might otherwise have, to administer upon the estate of Margaret Larsh.”

These issues the Orphans' Court declined to send to a Court of law for trial, and being of opinion that letters had been inadvertently granted to the appellant in ignorance of the right of the appellee, and without proper summons or notice to her, and without any renunciation in writing of her said right, the Court revoked the letters granted to the appellant, and granted letters to the appellee.

In thus refusing to send any of the issues prayed by the appellant to a Court of law for trial, the Orphans' Court assumed as matter of law, that the appellee could not renounce or waive her right of administration, unless upon proper summons or notice, or unless such renunciation be in writing.

The right of administration is one not resting in the discretion of the Orphans' Court, but is founded on positive law. *Nusz vs. Grove*, 27 Md., 401; *Carpenter vs. Jones*, 44 Md., 628. And in the protection of this right, the Code requires that the Court shall summon or notify

the parties thus entitled. *Article 93, secs. 17-33, of the Code.*

But yet this is a right which a party may renounce, or which he may lose by failing to make application for letters within proper time, or which by his own acts and conduct he may waive.

In providing that the right of administration may be renounced in writing, the Code does not mean that this right may not be lost or waived in any other manner. This was expressly decided in *Edwards vs. Bruce*, 8 Md., 387. In that case, letters of administration were granted on the 17th of October, 1854, to Edwards, and on the 4th of June, in the following year, Bruce filed a petition alleging that he was a brother of the intestate and entitled by law to letters, that he was neither summoned or notified by the Orphans' Court before the grant of letters to Edwards, and prayed that the letters thus improvidently granted might be revoked.

Although he was not summoned, yet it appeared that more than five months prior to the filing of the petition, he had knowledge in fact of the granting of letters to Edwards. There is no provision in the Code requiring parties entitled to the right of administration to make application within a specified time, yet inasmuch as the Code does not require an executor named in a will to make application within four months after notice, the Court held upon the principles of analogy, that the time thus prescribed for executors, ought to apply to parties entitled to administration in other rights.

The whole purpose of our testamentary system, say the Court, is to "guard against all needless delay, and to secure as prompt and speedy settlements of the estates of deceased persons as practicable."

If then the right of administration secured by sec. 33, Art. 93 of Code is barred by *lapse of time*, upon principles of analogy to other sections of the Code, which require

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executors named in a will to apply for letters within a specified time, with much greater reason ought Courts to hold that this right will be considered as waived, when at the instance and request of the party entitled, application has been made and letters have been granted to another person, and when such person in the discharge of the duties of the office, has after much labor and expense nearly completed the settlement of the estate.

To revoke letters of administration under such circumstances, would be a fraud upon the rights of an administrator, and a fraud perpetrated at the instance of the very person by the request of whom, the party thus injured assumed the duties of the office.

If the doctrine of estoppel, which will not permit one to repudiate his own declarations or conduct to the injury and prejudice of another, when upon the faith of such declarations or conduct others have been induced to act, is to be recognized at all, it seems to us that the facts set forth in the appellant's answer to the petition praying a revocation of his letters, if true, should estop the appellee from asserting the right of administration now claimed by her. If application for letters was made by the appellant at the instance and request of the appellee and her husband, and he had now nearly completed the settlement of the estate, every principle of good faith and fair dealing requires that the appellee should now be estopped from asserting the right of administration, to which she might otherwise have been entitled.

The appellant was, therefore, entitled to have the second issue prayed by him sent to a Court of law for trial.

It may be suggested that in order to avoid expense and delay, the determination of the question involved in this issue, might properly be left to the decision of the Orphans' Court. But this is a matter which addresses itself to the consideration of the parties in interest.

Being of opinion that the Orphans' Court erred in refusing to send this issue to a Court for trial, and in

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revoking the letters of administration granted to the appellant, the order appealed from will be reversed and the cause remanded.

*Order reversed, and  
cause remanded.*

(Decided 21st January, 1881.)

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GEORGE W. MACKENZIE, and others vs. EMMA RENS-  
SHAW, by her next friend WILLIAM RENSHAW.

*Practice in Ejectment under the Act of 1872, ch. 346.*

An action in ejectment was brought the 5th March, 1879, by the appellee against the appellants for certain lots of land described in the declaration, situate in Baltimore County, unoccupied, unimproved and vacant. To the declaration was attached a notice, signed by the plaintiff's attorney, addressed to the defendants, giving them notice of the suit, and requiring them to appear in Court in person or by attorney on the second Monday of March, 1879, to make defence to the action according to law, "otherwise judgment will be recovered against you for the premises described in the declaration, and you will be turned out of possession." All the defendants resided in the City of Baltimore. Three copies of the declaration and of this notice, one for each of the defendants, were issued by the clerk under seal, and placed in the hands of the sheriff of Baltimore County, who made return thereto: "Not found, no tenant in possession, copies set up on the premises." On the 15th September, 1879, at the following September term of the Court, none of the defendants having appeared, the Court rendered this judgment in the case: "Judgment for the plaintiff by default for property described in *narr.* one cent damages and costs." On the 19th September, the defendants appeared by counsel, and moved to strike out the judgment, alleging, they had received no notice whatever of the suit until they saw by the newspapers a day or two before, that the judgment had been recovered against them, and assigning among others as a

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reason that it should be struck out, that it was irregularly obtained and was contrary to law. **HELD:**

That, under the Act of 1872, ch. 346, the judgment was entered without authority and should be struck out.

APPEAL from the Circuit Court for Baltimore County.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., BOWIE, MILLER, ALVEY, ROBINSON and IRVING, J.

*William H. Cowan*, for the appellants.

Since the enactment of the Acts of 1870, ch. 420, and of 1872, ch. 346, the whole machinery of the action of ejectment has been changed. The Act of 1870, required a writ to issue to bring the defendant or defendants into Court. The Act of 1872, says what the writ shall be, or what the notice to the claimant or claimants shall be, and how it shall be served. Like all other matters involving rights of person and property, notice to parties interested is necessary before a Court can entertain jurisdiction of either person or property. Art. 23, Declaration of Rights of Maryland; Art. V, Constitution of the United States, contain similar announcements of a principle of common right to secure individual right against usurpation. The former uses the words "by the law of the land," and the latter, "without due process of law," which are equivalent in meaning. Due process of law, and law of the land, require that a party shall have notice of an action against him. Mr. Broom says service of the writ is necessary to give jurisdiction. *Broom's Common Law*, 167; *Cooley's Constitutional Limit.*, 353, 357; *Dartmouth College vs. Woodward*, 4 *Wheat.*, 519; *Broom's Constitutional Law*, 228; *Westervelt vs. Gregg*, 12

*N. Y.*, 209; *Bank of Columbia vs. Okely*, 4 *Wheat.*, 235; *Vanzant vs. Waddell*, 2 *Yerg.*, 260.

Due process of law, or law of the land, is such legal action as is right and proper to protect and secure person and property, and as decides, after a fair trial, not after an *ex parte* hearing, without an opportunity to the other side to be heard. In summing up the result of his investigations on the subject of due process of law, Mr. Cooley (page 356,) says: "The principles then, upon which the process is based, are to determine whether it is 'due process' or not, and not any considerations of mere form. Administrative and remedial process may change from time to time, but only with due regard to the landmarks established for the protection of the citizen. When the government, by its established agencies, interferes with the title to one's property, or with his independent enjoyment of it, and its action is called in question, &c." See also *Lentz vs. Charlton*, 23 *Wis.*, 478.

It may be said, the law has provided a mode of notice in this peculiar action, and that provision says what the law of the land is; and the pursuing of that course, is proceeding in the due course of the law. Mr. Cooley, at pages 402, 403, 404, &c., discusses the subject of notice by process from the Courts. He uses the following language: "Suits at the common law, however, proceed against the parties whose interests are sought to be affected; and only those persons are concluded by the adjudication, who are served with the process, or who voluntarily appear." No doubt on this being required to a proceeding that can be termed, according to the law of the land. In the note (2) to page 403 of said book, the Judge says: "Notice of some kind, is the vital breath that animates judicial jurisdiction over the person; it is the primary element of the application of the judicatory power; it is of the essence of the cause; without it, there cannot be parties, and without parties, there may be the

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form of a sentence, but no judgment obligating the person." It will not satisfy the demands of justice in due course of law to assert—Oh! something was done equivalent to notice; nothing is not an equivalent of anything; nobody ever saw or heard of anything like notice having been given in this case. Nor does any person know anything of it, except what the return says. No actual process was served on the defendant; nor was actual notice given to him in any way. The statutory notice is insufficient if literally followed, unless in the case of a party beyond legal process, and then the Court exercises its power over what is within its jurisdiction. What is known as *substituted service*, is resorted to, in some instances, to obtain jurisdiction. That is not applicable to a case of this kind. On the principle of substituted service—see Cooley at pages 403, 404, and notes. At page 404, Mr. Cooley says: "But such notice is restricted in its legal effect, and cannot be made available for all purposes. It will enable the Court to give effect to the proceeding so far as it is one *in rem*, but when the *res* is disposed of, the authority of the Court ceases."

Ejectment is a mixed action. The damages for the trespass are rendered *in personam*; for the recovery of the property the judgment is *in rem*. The judgment cannot be simply for the recovery of the thing in controversy. A trespass must be proved or be assumed, else there is no case. The judgment against the defendant is that he committed the trespass and ejectment. No damages can be given unless the defendant be summoned, and no judgment can be entered against the defendant unless some damages be given. No costs can be charged against a defendant in a proceeding purely *in rem*. The costs are in the discretion of the Court, in the now ejectment form of action, by the express language of the Act of 1872. The Court could not exercise a discretion in a case in which it had no power. In the judicial history

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of England or America, no authority, deserving the name, can be found to support a judgment *in personam*, against a party who was not summoned or notified of the pendency of the action against him. The so frequently quoted and universally prevailing principle of "due course of law," "law of the land" forbid such injustice. Right, reason and justice, forbid such a procedure as tyrannical and oppressive.

A judgment by default against the *casual ejector*, might be stricken out after the term. It is an exception to the rule that a judgment will not be stricken out after the term at which it has been entered. *Klinefelter's Lessee vs. Carey*, 3 G. & J., 349; *Dennis' Lessee vs. Kelso*, 28 Md., 333; *Alex. British Statutes*, 212.

The judgment by default settles certain things, as even the jurisdiction when a party has been summoned; but where the record shows that jurisdiction of the person did not attach, no judgment can be given either by default or final. The reason why the judgment against the casual ejector will be stricken out if no notice was given to the real defendant, was because fiction did not altogether supplant fact; and the Court would not raise its arm merely to beat the air.

*John P. Poe* and *E. O. Hinkley*, for the appellee.

There are no merits in the application of the appellants. The title of the appellee is confessedly the legal title to the premises, while the only possible claim held by the appellants was contingent upon the payment of the purchase money of \$6000 on or before the 25th April, 1878, and interest thereon semi-annually in the meantime. The interest was in arrears from the 25th April, 1877, and the appellants did not pay the purchase money on or before the 25th April, 1878, but were in arrears for nearly eleven months when the ejectment was brought. If the appellants had or shall have any remedy (which is, how-



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ever, not admitted,) it can only be sought in a Court of equity, and then only, upon paying the principal, interest and costs due to the appellee. This they have never tendered.

The return of the sheriff shows a strict compliance with the statute. *Abell, Garnishee vs. Simon*, 49 *Md.*, 318.

The judgment by default, conclusively establishes the right of the plaintiff to recover, and the jurisdiction of the Court, and hence establishes her legal title, which the the declaration asserts. *Cooper vs. Roche*, 36 *Md.*, 563; *Green vs. Hamilton*, 16 *Md.*, 317; *Heffner vs. Lynch*, 21 *Md.*, 555, 6.

MILLER, J., delivered the opinion of the Court.

This appeal is from the overruling of a motion to strike out a judgment rendered in an ejectment suit. The action was brought in the Circuit Court for Baltimore County, on the 5th of March, 1879, by the appellee, Emma Renshaw, by her husband and next friend, William Renshaw, against the appellants, George W. MacKenzie, trustee, Howell Downing and Elizabeth Downing, his wife, for certain lots of land described in the declaration, situated in Baltimore County, unoccupied, unimproved and vacant.

The suit was, of course, instituted since the passage of the Act of 1872, ch. 346, which has made important changes in the proceedings and practice in actions of ejectment in this State. To the declaration was attached a notice, signed by the plaintiff's attorney, addressed to the defendants, giving them notice of the suit, and requiring them to appear in Court in person or by attorney on the second Monday of March, 1879, to make defence to the action according to law, "otherwise judgment will be recovered against you for the premises described in the declaration, and you will be turned out of possession." All the

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defendants resided in the City of Baltimore. Three copies of the declaration and of this notice, one for each of the defendants, were issued by the clerk under seal, and placed in the hands of the sheriff of Baltimore County, who made return thereto: "Not found, no tenant in possession, copies set up on the premises." On the 15th of September, 1879, at the following September term of the Court, none of the defendants having appeared, the Court rendered this judgment in the case: "Judgment for the plaintiff by default for property described in *narr.*, one cent damages and costs." Promptly thereafter, on the 19th of September, the defendants appeared by counsel and moved to strike out this judgment, alleging they had received no notice whatever of the suit until they saw it published in the papers a day or two before, that this judgment had been recovered against them, and assigning among others, as a reason why it should be struck out, that it was irregularly obtained and is contrary to law. This motion was overruled, and hence this appeal.

The construction and effect of the Act of 1872, are very important questions, but all that we propose to decide now, is whether the judgment rendered in this case was authorized by law and duly entered. The Act in question, after providing that the action of ejectment shall be commenced by filing a declaration, in which the real claimant shall be named as plaintiff, and the tenant in possession, or the party claiming adversely shall be defendant, declares that "a copy of the declaration with a written notice of the suit addressed to the defendant, shall be served on each of the defendants, *or the land*, if no person be in actual possession; that to this declaration, the defendant or any other person with leave of the Court, may appear and plead not guilty, which plea shall be held a confession of the possession and ejectment, and shall only put in issue the title to the premises, and right of possession, and the amount of damages claimed

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by the plaintiff," (which in this case was \$6000,) "but *any* defendant may *refuse* to appear, or file a *disclaimer* of title to the land or any part thereof, in *which case* the plaintiff shall recover judgment against the defendant so *disclaiming* or *refusing* to defend for the land or so much thereof as shall not be defended, but the costs shall be subject to the discretion of the Court, *and the trial shall then proceed* against the party making defence, under the rules and practice of the Court as the same existed prior to the year 1870, except so far as the same may be changed by this Act." And it is then provided that the plaintiff "shall also recover as damages in this action, the *mesne profits* and damages sustained by him, and caused by the ejectment and detention of the premises, up to the time of the determination of the case."

It is manifest that the Court below in rendering the judgment complained of in the present case, assumed that the power to render it was given by this statute, and that they acted under it in ordering the judgment to be entered. But in our opinion the law confers no such power in the case of a simple *failure* of all the defendants to appear. By the plain reading of the Act, the judgment therein mentioned, in favor of the plaintiff for the land, or so much thereof as shall not be defended, can be given only in cases where one or more of several defendants, after process has been duly served, *refuse* to appear or *file a disclaimer* of title, and where another or others have appeared and made defence, so that as against them the trial can proceed. The law does not declare that such a judgment may be rendered in favor of the plaintiff upon the mere failure of the sole or all of the defendants to appear, and we cannot place any such construction upon it. Nor can we treat this as an authorized judgment by default. The Act makes no provision for such a judgment, and this omission may well have been by design on

the part of the Legislature. Under the old practice where the tenant in possession failed to appear in place of the casual ejector, according to the exigency of the notice, a judgment by default was entered against the casual ejector, and thereupon a writ of *habere facias* could be issued under which the tenant in possession could be put out, and the lessor of the plaintiff put in possession of the premises. But such a judgment, and indeed any judgment in ejectment under the old practice, was conclusive upon nobody, and when the Legislature by this Act abolished the fictions, and required the real parties in interest to become plaintiffs and defendants in such actions, they may have foreborne, in view of the possibly binding and conclusive effect of such judgment as between the parties, to provide for the case of a judgment by default for want of an appearance, against the sole and only defendants, which would have the effect of a definite and conclusive adjudication against their title. In the English Common Law Procedure Act, (15 & 16 *Vic.*, *ch.* 76,) which also abolished the common law fictions in this action, it is expressly provided that the writ shall be served in the same manner as an ejectment has heretofore been served, or in such manner as the Court or a Judge shall order, and in case of vacant possession by posting a copy thereof upon the door of the dwelling-house, or other conspicuous part of the property, and "in case *no appearance* shall be entered within the time appointed, or if an appearance be entered, but the defence be limited to a part only, the plaintiffs shall be at liberty to sign a judgment that the person whose title is asserted in the writ, shall recover possession *of the land*, or of the part thereof to which the defence does not apply." There is no provision in our Act as to any such judgment where *no appearance* by any of the defendants is entered, and it is not the province of the Courts to supply the omission, especially not in a case like the present where the land being vacant and unim-

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proved, the process was served simply, as the sheriff's return states, by copies being set up on the premises, without showing how, or where on the land they were so set up, and where the defendants had no other notice in fact of the suit. We are, therefore, clearly of opinion this judgment was entered without authority, and the order overruling the motion to strike it out must be reversed. In what we have thus said, we are, of course, to be understood as referring to the ordinary action of ejectment, and not to such an action between landlord and tenant under the statute of 4 *Geo. 2, ch. 28*, as modified by the second section of the Act of 1872, ch. 346.

In the course of the argument at bar several other questions in regard to the construction and effect of this Act were discussed, upon which it is not necessary now to express any definite opinion. The law however seems to us defective in some important particulars. Not only is there no provision made for a judgment by default as above stated, similar to that provided by the English Common Law Procedure Act, but there are not the same, nor indeed any proper safeguards in reference to service of process in cases where the lands are wholly vacant, unenclosed and unimproved. There is a large quantity of such land in this State, and a law which provides simply that a copy of the declaration and notice shall be served "*on the land* if no person be in actual possession thereof," and makes such service effective and the judgment in the action conclusive between the parties named in the declaration, seems to us to open wide the door to the infliction of grievous and irreparable wrongs upon owners, who may happen to reside in a different county from that in which the land is situated, or be non-residents of the State. Under the ancient mode of proceeding by ejectment in England peculiar and special formalities were required, and it was necessary that an open and notorious *act* should be done on the property itself, in cases where the

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possession was vacant, where the premises were wholly deserted by the tenant and his place of residence unknown, and where the case was not provided for by the statute of 4 Geo. 2, ch. 28. The mode of proceeding in such cases is pointed out in 2 *Tidd's Practice*, 1200. We do not suggest that any such peculiar formalities should be provided by legislation in this State, but we think something more should be required to give notice to owners or claimants in such cases than the mere service of the declaration "*on the land.*"

In the present case the judgment overruling the motion to strike out will be reversed, and the cause remanded in order that the defendants who have now appealed may be allowed to defend the action.

*Judgment reversed, and  
cause remanded.*

(Decided 21st January, 1881.)

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JAMES FOOS vs. WILLIAM W. SCARF, and others.

*Powers in Deeds and a Will—Parties to a Proceeding in Equity.*

In 1848, S. conveyed by deed certain leasehold property in Baltimore City, to A. G. R., in trust, for the sole and separate use of his wife A., "for and during her natural life," with power to receive the rents and profits thereof for her use and benefit, or to sell and dispose of the same or any part thereof absolutely, "so that neither the property nor the rents and profits or the proceeds thereof, shall at any time be subject to the control of S., nor be in anywise liable for his debts," and from and immediately after the death of A., "then in trust, as to the said property, or so much of the same as may remain undisposed of by her deed or contract, for the use and behoof of her issue, if any; and in the event of her death without

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issue, then to revert to the said S., his heirs or assigns." In 1850, S. purchased from McL., trustee, other leasehold property in said city, and united with McL., trustee, in conveying it to W. R. R., in trust, for the sole and separate use of A., "for the term of her natural life without the let or control of her present or of any future husband she might have, and if she should survive her present husband, then after his death with power to grant, assign, sell or dispose of said premises either by deed or will, but should she depart this life before the said S., then and in such case for the use of the said S., and his assigns." In August, 1851, S. purchased from C. other leasehold property in said city, and by his direction, C. conveyed it to W. R. R., "in trust, for the uses and purposes mentioned and set forth" in the deed from McL. and S. In October, 1851, S. purchased from L. other leasehold property in said city, and by his direction, L. conveyed it to W. R. R., in trust, "for the sole and separate use of A. without the let or control of her present or of any future husband whom she might have, and if she should survive her present husband, then after his death, with power to grant, assign, sell or dispose of the said premises either by deed or will, and whether *sole or covert*; but should she depart this life before the said S., then and in such case for the use of the said S., his executors, administrators and assigns." S. died in May, 1855, leaving a will executed in that month, by which he bequeathed to A., all his property for "her sole use and benefit during her natural life and to dispose of as she might think best;" and he made her his executrix. A. afterwards intermarried with F. and died intestate, in October, 1877, without issue by either marriage, and without having sold or disposed of by deed the property mentioned. In a proceeding to obtain a decree for the sale of the leasehold property and for a distribution of the proceeds among the parties entitled, it was HELD:

- 1st. That, as by the deeds of 1848, 1850, August, 1851, and October, 1851, (though there was no express limitation of an equitable life estate to A. by this latter deed,) only equitable life estates were conveyed, with powers to A. of disposition superadded; which were not executed to the extent of affecting the property in controversy, F., the sole appellant, took no interest therein after her death.
- 2nd. That the power of disposition given to A. by S's will, under which she took a life estate in the property, not having been executed by A. the title to the property in controversy has not been affected by the will.

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3rd. That there should be an administration *d. b. n.* on S's estate, and that such administrator should be made a party to these proceedings before the decree for a sale be executed, as, if any interest in the property reverted to S's estate, such administration would be necessary to give title to the distributees and to purchasers under the decree.

The intention to execute a power, either by will or any other instrument, must appear by a reference in the instrument to the power, or to the subject of it, or from the fact that the instrument would be inoperative without the aid of the power.

**APPEAL** from the Circuit Court of Baltimore City.

The case is stated in the opinion of the Court. By the deed from Clarke to Foos in December, 1878, therein mentioned, Clarke granted, bargained, sold, assigned, transferred, set over, quit-claimed and released, unto the said Foos, his executors, administrators and assigns, all the right, title and interest which he, the said Clarke, might have in and to the lot and premises described in the deed of August, 1851, from Clarke to Robinson set out in the opinion. And by the deed from Lanahan in December, 1878, mentioned in the opinion, Lanahan granted, bargained, sold, assigned, transferred, set over, quit-claimed and released, unto the said Foos, his executors, administrators and assigns, all the right, title, interest and estate, which he, the said Lanahan, might have in the lot and premises described in the deed of October, 1851, from Lanahan to Robertson, set out in the opinion.

The cause was argued before BARTOL, C. J., GRASON, MILLER, ALVEY, ROBINSON and IRVING, J.

*Joseph Blyth Allston*, for the appellant.

The bill is multifarious in that it seeks a construction of the deeds of trust adverse to Foos, and a sale for the purposes of partition, in which he is admittedly not interested at the same time. It is also multifarious in



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asking the construction of two trusts totally distinct, the beneficiaries of which may be an entirely distinct set of people. This objection may be taken by answer as is done here, as well as by demurrer. *Trego, et al. vs. Skinner, et al.*, 42 Md., 426; *Tartar, et al., Trustees vs. Gibbs, et al.*, 24 Md., 323.

None of the complainants or respondents who claim as heirs of Scarf, are necessary or proper parties to the suit. The property is confessedly all leasehold, and even if limited to the heirs, as is done in the deed to Alexander G. Robertson, it will nevertheless go to the executrix, and on her death to the administrator *de bonis non*, by whom alone the bill should have been filed. If the objection be made that the word heirs may be used here as descriptive of a set of persons taking by purchase or limitation, the obvious reply is, that this only strengthens and illustrates the former objection of multifariousness, by showing the absolute necessity of a distinct proceeding in reference to the different property held under the different trust deeds in the case. *Sheppard's Touchstone*, p. 76, ch. 5.

Upon the merits—The terms of the trust declared in the deed to W. R. Robinson are executed. Mrs. Foos, having survived her husband, Scarf, took an absolute estate in the property, which on her death vests in her second husband. The power is annexed to enable her to deal independently with the property in the event of her marrying again. Any other construction presents a case not contemplated by the terms of the trust. If this latter view obtain, then the property reverts to the grantors, Thomas M. Lanahan and George B. Clarke, whose deeds to James Foos vest the equitable title to the property in him. *Lewin on Trusts*, 118, *et seq.*

*James W. Denny*, for the appellees.

The limitation in the will of George W. Scarf in favor of his wife is clearly defined to be a life estate, with a

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power of disposition. No estate so definitely limited can be enlarged by implication into an absolute estate; such enlargement has only arisen by the conferment upon the devisee of a power of disposition, where the estate given was general or indefinite, in which case, "the devisee or *legatee* takes not a simple power but the property absolutely. But, when the property is given, as in this case, to a person expressly for life, and there be annexed to such gift a power of disposition," \* \* \* \* "then the rule is different, and the first taker in such case takes but an estate for life, with the power annexed; and if the person taking, fails to execute the power, and thus dispose of" the property, "it goes where there is no gift or devise over, to the heir or next of kin of the testator, according to the nature of the property."

Such is the ruling of this Court in *Benesch vs. Clark, &c.*, 49 Md., 497. See *Smith vs. Bell*, 6 Peters, 72; *Boyd vs. Strahan*, 35 Ill., 359; *Bradley vs. Westcott*, 13 Ves., 450; *Brant vs. Va. Coal & Iron Co.*, 3 Otto, 332.

The doctrine laid down in *Benesch's Case* is applicable alike to fee simple and leasehold estates. The very question in that case was, as to the effect of a bequest to a widow for life, with power of disposition, upon a piece of leasehold property, and whether the power of disposition had been executed by an assignment, &c., by which the widow conveyed, to use the language of the Court, "the entire residue of the unexpired term, with the right and benefit of renewal from time to time forever."

Besides, the Court in its opinion, partly quoted above, recognizes the application to both classes of property, when, in providing for the transmission of the estate on the determination of the life interest, and a failure to execute the power, it says, that it goes "to the heir or next of kin of the testator, according to the nature of the estate."

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So that by the application of the principles laid down by this Court, the express limitation of the estate given to Ann A. Scarf by her husband's will, prevents its enlargement by the superadded power of disposition.

It was necessary to make the administrator *d. b. n.* of George W. Scarf, a party to the bill filed in the cause. Clearly, under the deed of the Howard street property, the heirs of George W. Scarf take as *purchaser*; and as to all the property, only those of his heirs or representatives who were *in esse*, at the death of Ann A. Scarf or Ann Foos, without leaving issue or exercising the power of appointment as to the Howard street property, and as to the remaining property, upon a failure to dispose of it, would be entitled to share in the proceeds of its sale. *Buck vs. Lantz*, 49 *Md.*, 439.

In such case, the trustee, under the various deeds of trust, would hold for the benefit of the heirs or representatives, making themselves such at the time of the happening of the contingency; and a Court of equity having jurisdiction of the trusts, could execute and control the trusts and decree concerning them, without the administrator of George W. Scarf being before it.

If, however, the appellees, in the construction sought to be placed upon the different papers in the record, are sustained by this Court, and yet the Court should think that the administrator *d. b. n.* should have been made a party, the appellees ask that the Court will exercise the power under the provision of the Revised Code, sec. 51, p. 772, in order that substantial justice may be accomplished by remanding the record for amendment, having passed on the questions properly raised thereby.

MILLER, J., delivered the opinion of the Court.

The decree from which this appeal is taken determines that the leasehold property mentioned in the proceedings belongs to the heirs, distributees and legal representatives

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of George W. Scarf, deceased, that the appellant, James Foos has no interest therein, and that the same be sold for the purpose of partition among the parties entitled thereto. The facts necessary to be stated are as follows :

1st. In February, 1848, Scarf conveyed by deed certain leasehold property on Howard Street in the City of Baltimore to Alex. G. Robinson, in trust for the sole and separate use of his wife Ann Scarf "*for and during her natural life,*" with power to receive the rents and profits thereof for her own use and benefit, or to sell and dispose of the same or any part thereof absolutely, "so that neither the property nor the rents and profits or the proceeds thereof, shall at any time be subject to the control of the said George W. Scarf, nor be in anywise liable for his debts," and from and immediately after the death of the said Ann Scarf, then in trust, as to the said property or so much of the same as may remain undisposed of by her *deed or contract* for the use and behoof of her issue if any, and in the event of her death without issue, then to *revert back* to the said George W. Scarf, his heirs or assigns."

2nd. In October, 1850, Scarf purchased from Robert M. McLane, trustee, leasehold property on Pearl Street, and directed the trustee to convey, and united with him in conveying the same by deed to William R. Robinson in trust, for the sole and separate use of Ann Scarf, wife of the said George, "*for the term of her natural life* without the let or control of her present or of any future husband whom she may have, and if she should survive her present husband, then after his death with *power* to grant, assign, sell or dispose of said premises either by *deed or will*, but should she depart this life before the said George W. Scarf, then and in such case for the use of the said George W. Scarf and his assigns."

3rd. In August, 1851, Scarf purchased leasehold property on Harford Avenue from George B. Clarke, and

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directed Clarke to convey the same by deed (which was duly executed,) to William R. Robinson "in trust for the uses and purposes mentioned and set forth in" the deed from McLane and Scarf of October, 1850, above mentioned.

4th. In October, 1851, Scarf purchased another leasehold property on Boyd Street from Thomas M. Lanahan, and directed him to convey the same by deed (which was also duly executed) to William R. Robinson in trust "for the sole and separate use of Ann Scarf, wife of George W. Scarf, without the let or control of her present or of any future husband whom she may have, and if she should survive her present husband, then after his death with *power* to her to grant, assign, sell or dispose of the said premises either by deed or by will, and whether *sole* or *covert*, but should she depart this life before the said George W. Scarf, then and in such case for the use of the said George W. Scarf, his executors, administrators and assigns."

Scarf died in May, 1855, leaving a will executed on the third of that month by which he gave and bequeathed unto his wife Ann Scarf "all the property" he possessed "in this world, that is to say, all houses, lots, leaseholds, rents, money, and every thing of any value, to the said Ann Scarf for her sole use and benefit *during her natural life*, and to dispose of as she thinks best," and appointed his said wife sole executrix of his will. Mrs. Scarf subsequently intermarried with James Foos, the appellant, and died in October, 1877, intestate, without ever having had issue by either marriage, and without ever having sold or disposed of by deed, the property now in controversy. The parties claiming this property, are, on the one side, the appellant, the surviving husband, and on the other, the next of kin and heirs-at-law of George W. Scarf.

We think it very clear that by the deed of February, 1848, an equitable *life estate only* was conveyed to the wife with *power* to her to dispose of the property or any part of

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it by deed or contract. It has been contended on the part of the appellant that this power was executed by the paper of the 20th of August, 1867. The rule by which the execution of a power either by will or any other instrument, is to be determined, is well settled. The intention to execute the power must appear by a reference in the instrument to the power, or to the subject of it, or from the fact that the instrument would be inoperative without the aid of the power. *Morey vs. Michael*, 18 Md., 227; *Society of Red Men vs. Clendinen*, 44 Md., 429. Here none of the requisites are to be found. The paper makes no reference to the power contained in the deed, nor to the property it conveys, and there is nothing to show there was no other property upon which the instrument could operate.

It is equally clear that by the deeds of October, 1850, and August, 1851, only equitable *life estates* were conveyed to the wife with power to her, in case she survived her then husband, to dispose of the property after his death by deed or will, and it is not pretended that these powers have ever been executed to the extent of affecting the property now in controversy. So far, therefore, as these three deeds are concerned, life estates only were conveyed with powers of disposition superadded, and as the wife during her life never made any appointment or disposition of the property in favor of the appellant, it follows that upon her death, he ceased to have any interest therein. It is hardly necessary to add that the appellant acquired nothing by the deed of December, 1878, which he obtained from Clarke, for it sufficiently appears from the proof that the purchase money for the whole absolute interest in the property conveyed by Clarke's deed of August, 1851, was paid by Scarf, and that that deed was made by his direction. After the execution of that deed Clarke had no further interest, legal or equitable, in the property, nor was there any resulting trust in his

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favor. But the interest in the property which Scarf held either under the deeds themselves, or which he did not part with by them, provided the powers remained unexecuted, was undoubtedly an interest he could devise by will, and the question therefore is, did his wife take more than a life estate under the devise to her in his will, of all his property "for her sole use and benefit *during her natural life*, and to dispose of as she thinks best."

In the case of *Benesch vs. Clarke*, 49 Md., 497, we decided in accordance with all the authorities, that where an estate is given to a person generally or indefinitely with power of disposition, such gift carries the entire estate, and the devisee or legatee takes not a simple power, but the property absolutely; but where the property is given to a person expressly for life, and there be annexed to such gift a power of disposition of the reversion, the rule is different; and in such case the first taker takes but an estate for life with the power annexed; and if the person so taking fails to execute the power, the property goes where there is no gift over to the heir or next of kin of the testator, according to the nature of the property. Such is the rule as laid down by Chancellor KENT in *Jackson vs. Robins*, 16 Johns., 588. It is perhaps more clearly and concisely stated by Mr. Preston thus: "Grant that an *express estate* is limited, and a power of disposition either generally or in favor of particular persons is added, the person to whom the devise is made, will have merely the estate limited by *express words*, and the right in point of *power*, and not of *estate*, of disposing of the remainder," and as an instance of the application of the rule he cites as good law, a case very similar to the terms of the will before us: "So a devise to one for life to dispose at his will and pleasure, gives an estate for life only; for the words superadded to the limitation merely express an intention to authorize a power of alienation during that period for which an estate is devised in terms." 2

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*Preston on Estates*, 82, 85. It was said by Sir WM. GRANT, the Master of the Rolls, in *Bradley vs. Westcott*, 13 Ves., 445, "The distinction is perhaps slight between a gift for life, with a power of disposition superadded, and a gift to a person indefinitely with a superadded power to dispose by deed or will, but that distinction is perfectly established." Besides the authorities cited in *Benesch vs. Clarke*, the same distinction has been recognized and adopted in the following cases, some of which are very similar to the present, and we refer to them as sustaining the rule approved by Chancellor KENT. *Nannock vs. Horton*, 7 Ves., 392; *Reid vs. Shergold*, 10 Ves., 370; *Morris vs. Phaler*, 1 Watts, 389; *Hess vs. Hess*, 5 Watts, 191; *Smith vs. Starr*, 3 Whart., 62; *Girard Life Ins. Co. vs. Chambers*, 10 Wriyht, 485; *Second Reformed Church vs. Disbrow*, 52 Penn. State Rep., 219; *Downey vs. Gordon*, 36 N. J. (Law Rep.) 460; *Andrews vs. Brumfield*, 32 Miss., 115; *Boyd vs. Strahan*, 35 Ill., 359; *Smith vs. Bell*, 6 Pet., 72; *Brant vs. Virginia Coal & Iron Co.*, 3 Otto, 332. Applying then this rule of construction to the will before us, we are constrained to hold that it gives only a life estate to the wife with a superadded power of disposition, and as that power has never been executed with respect to the property in dispute, the present title to that property stands unaffected by this will.

This leaves for consideration and construction the deed of October, 1851, by which the Boyd street property was conveyed. In that deed there is no express limitation of an equitable life estate to the wife, but the trust in her favor contains no words of limitation, and the deed was executed prior to the passage of the Conveyancing Act of 1856, ch. 154, and prior to the adoption of the Code which by Article 24, sec. 11, dispenses with the necessity of inserting words of inheritance in a deed in order to pass fee. It is true that before the enactment of these laws, the rule was not so universal and imperative as to require



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the Courts to hold that such words must be used in every deed, or a life estate only, and not a fee will pass. If in a particular case, it plainly appears from the terms and provisions of the deed itself, the purposes it was designed to subserve, and the circumstances under which it was executed, that the *intention* was to convey an absolute estate; such an estate will pass without the use of words of limitation. *Merritt vs. Disney*, 48 Md., 344. But we can discover in the terms and provisions of this deed, no such manifest intention to grant to the wife more than an equitable life estate, as would justify us in dispensing with the general rule. The present title therefore to the property described in this deed follows that of the property mentioned in the other conveyances. The same observations that were made in regard to the deed of December, 1878, from Clarke to the appellant, hold good as to the deed which he, at the same time, obtained from Lananhan. The result then is that the appellant has no interest in any of the property in controversy.

We agree with the Court below, that the bill in this case is not open to the objection of multifariousness, but we think there should be an administration *de bonis non* on the estate of George W. Scarf, and that such administrator should be made a party to this suit before the decree for a sale is executed. The property is entirely leasehold, and if any interest therein after the death of his wife, reverted or fell back into his estate, such an administration is indispensably necessary in order to give a good title to the distributees. *Alexander vs. Stewart*, 8 G. & J., 226; and to the purchasers under this decree. We do not mean now definitely to determine the construction of either of these deeds with respect to the interests of any of the parties, other than the appellant thereunder, for that question is not regularly presented by this appeal, which was taken by the appellant alone. All that we mean to decide is, that as the presence of the

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administrator *de bonis non*, will remove all difficulty as to the validity of the title to be acquired by a purchaser under the decree, and place the property in the market free of all doubt as to the title to be sold, he should for this reason if for no other, be made a party to the suit before that part of the decree which directs a sale is executed. It was stated and conceded in argument, that such administrators had already been appointed, and in order that they may be brought in and made parties, the cause will be remanded under Article 5, sec. 28 of the Code, without affirming or reversing the decree appealed from.

*Cause remanded.*

(Decided 21st January, 1881.)

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THE FROSTBURG PERPETUAL BUILDING ASSOCIATION  
OF FROSTBURG, MD. vs. CHARLES H. HAMILL and  
WIFE, and others.

*Charge on a Wife's Separate Estate—Notice.*

In 1866, real estate belonging to H., was sold to H's wife by the sheriff under a *fi. fa.* issued on a judgment against H. and a deed duly executed by the sheriff to H's wife. Afterwards, H. mortgaged the same property to C., trustee for H's wife, to secure to her money derived from her father's estate and borrowed by H. In 1875, C., as trustee for H's wife, and H. conveyed as grantors, the same property by way of mortgage to a building association to secure payment of money loaned to H's wife. This instrument containing the usual mortgage conditions and covenants on the part of H's wife, was signed, sealed and acknowledged by C., H's wife and H. and duly sworn to and recorded. In proceedings by the building association to sell the property described in the alleged mortgage, it was HELD:

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That this instrument constituted in equity a charge upon H's wife's estate; and that the building association was entitled to enforce the mortgage against the property.

A second mortgagee with actual notice of a first mortgage is not in a position to question the equities of the first mortgagee.

APPEAL from the Circuit Court for Allegany County, in Equity.

The case is stated in the opinion of the Court.

The cause was submitted by the appellant to BARTOL, C. J., BOWIE, MILLER, ROBINSON and IRVING, J. No brief was filed for the appellees.

*William Brace* and *Benjamin A. Richmond*, for the appellant.

BARTOL, C. J., delivered the opinion of the Court.

The bill of complaint in this case was filed by the appellant, to obtain a decree for the sale of certain real estate described in a mortgage, dated July 12th 1875, exhibited with the bill.

No question is raised with respect to the amount due the appellant which the mortgage was intended to secure; but the single question presented, is whether the mortgage can be enforced against the property and estate of Mrs. Hamill, therein described. To solve this question, it is material to consider:

*First.* The nature of the title or estate held by Mrs. Hamill at the time the mortgage was executed, and

*Secondly.* Whether that instrument is sufficient in its terms to create a lien against her estate.

*First.* It appears from the agreed statement of facts contained in the record, that in January 1866, the property belonged to Charles H. Hamill in fee, that it was

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seized by the sheriff under a writ of *fieri facias*, issued upon a judgment recovered against Charles H. Hamill, and on the 3rd day of February 1866, was sold by the sheriff, under said writ, at public sale, and purchased by Catharine Hamill, as appears by the special return made by the sheriff, who by deed, dated February 24th, conveyed the same to her in fee simple. Consequently the property thus acquired, was held by her *to her separate use*, under the provisions of the *Code*, Art. 45, secs. 1 and 2, with the right and power "of devising the same as fully as if she were a *feme sole*," and of "conveying the same by a joint deed with her husband." And with power to charge the same by her contract executed with the concurrence of her husband, as decided in *Hall & Hume vs. Eccleston*, 37 Md., 510, which contract may be enforced in a Court of equity.

It appears from the record, that on the 7th day of May 1866, after the property had been acquired by Mrs. Hamill, as before stated, a deed of mortgage of the same property was made by her husband, to Aden Clary, trustee, for her use and benefit, for the purpose as therein stated of securing to her the payment of the sum of \$16,789.59, which was her separate property derived from the estate of her father, and which was loaned to her husband.

That mortgage also embraced certain personal property; but so far as the real estate was concerned, it appears to be an extraordinary document, when it is remembered that the real estate was already vested in her as her separate property. The instrument, however, has no significance in this case, except as showing the reason why it seems to have been thought necessary for Aden Clary as trustee to unite in the mortgage to the appellant of July 12th 1875.

But as Aden Clary had no power to execute such a paper, the mortgage derives no force or validity from the circumstance that he was a party to it. The instrument

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must be considered as having been executed by Charles H. Hamill and his wife, and the question to be determined is, whether it constituted a charge upon her separate estate described therein.

The instrument purports on its face to be a mortgage made by Aden Clary, trustee for Catharine Hamill, and Charles H. Hamill. It recites, that in consideration of \$1300, now due from Catharine Hamill to the appellant, being money advanced to her by the said corporation, of which she is a member, for the redemption of five shares of its stock, being the par value of said five shares, the said Aden Clary, trustee, and Charles H. Hamill, grant unto the appellant the lots of ground therein described.

Then follows the condition, that if the said Catharine shall truly pay the moneys, and perform the covenants and obligations hereinafter mentioned, to be paid and performed by her, then this mortgage shall be void. Then are enumerated the several covenants of Catharine Hamill.

And it is further provided, that if she shall make default, &c., "then it shall be lawful for the appellant to sell said mortgaged property, after giving at least twenty days public notice, &c., to pay in the first place, the expenses incident to the sale, and in the next place, to pay the amount due on the mortgage." The instrument is signed and sealed by *Aden Clary*, Catharine Hamill, and C. H. Hamill, who acknowledged the same before a justice of the peace as their respective act and deed, and the affidavit of the truth and *bona fides* of the consideration therein stated, was made by the secretary of the appellant, in due form as required by the Code; and the mortgage was duly recorded.

The only ground upon which it is contended, that this instrument does not create a charge upon the real estate of Mrs. Hamill therein described, is that she did not unite in the same as grantor.

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For this reason the learned Judge of the Circuit Court held that the mortgage could not be enforced against her property, not being a valid and sufficient deed of conveyance by her.

To constitute a valid deed of conveyance at the common law, it is necessary that the instrument shall contain sufficient words to express the intention of the grantor to convey the estate; or in other words, the party grantor must unite in the grant. This is a plain principle, fully established by the authorities cited by the Judge of the Circuit Court in his opinion.

The question before us, however, is not whether the instrument is a good legal conveyance of Mrs. Hamill's estate; but whether it is sufficient to create a charge thereon, which may be enforced in a Court of equity. As before said, the property was held by her to *her separate use*, and it is well settled that it was competent for her to create a charge thereon by her covenant or contract entered into with the concurrence of her husband, whereby her intention to charge the same has been manifested by express terms, or by clear implication.

This was expressly decided in *Hall & Hume vs. Eccleston*, before referred to. We need not repeat the reasoning of the Court in that case, or refer at length to the authorities there cited in the opinion; they appear to us fully to govern the present case. There the property of Mrs. Eccleston was held to her separate use under the provisions of the Code; the instrument in question was a joint and a several promissory note of herself and her husband, for the payment of a sum of money, wherein the parties "bound their separate and individual estates," and it was held that this constituted a charge upon the separate estate of Mrs. Eccleston, which could be enforced in a Court of equity.

The instrument before us shows that the consideration for the mortgage passed to Mrs. Hamill, and its purpose

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was to secure the performance of the several covenants entered into by her; and by express terms, it was stipulated that in case of default on her part, the mortgagee shall have power to sell the property therein described, for the purpose of paying the money due from her to the mortgagee. This constitutes in equity a valid charge upon her estate.

The bill of complaint alleges that the property was conveyed by Mrs. Hamill and the other parties thereto, by way of mortgage, &c. That is to say, it alleges a legal conveyance by Mrs. Hamill. By an agreement of the parties contained in the record, it was provided that "the bill shall be considered as amended, by inserting a charge that at the time of executing the alleged mortgage, Catharine Hamill, as well as the other mortgagors, intended to create a lien on the property therein described by way of mortgage, and supposed she was so doing, and by inserting a prayer that said mortgage be reformed and corrected by inserting her name as grantor; and it was further agreed that the answer of Mr. and Mrs. Hamill shall be considered amended, by inserting an admission therein of the several allegations of the bill and each of them, and by setting up by way of *plea*, the defence that the mortgage is not binding on her, nor a valid conveyance of, or charge upon her property, by reason of the fact that she is not named as grantor therein, and this agreement shall stand for, and be considered as such amendment of pleadings, and the case is hereby submitted to the Court for final decree."

Under this agreement, and with the pleadings so amended, we are of opinion that the appellant is entitled to enforce the mortgage against the property of Mrs. Hamill, and to a decree for its sale. So far as respects the rights of the subsequent mortgagee, William Price, trustee, under the mortgage of Hamill and wife, dated May 29th, 1877, as it appears by the agreement of facts,

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that he had actual notice of the mortgage of July 12th, 1875, at the time the mortgage to him was executed, he is not in a position to question the equities of the appellant.

The decree of the Circuit Court will be reversed, and the cause remanded, to the end that a decree may be passed, and further proceedings had in conformity to this opinion. As against Lloyd Lowndes, Jr., administrator of Aden Clary, the bill ought to be dismissed, he having no interest in the matter.

*Decree reversed, and  
cause remanded.*

(Decided 21st January, 1881.)

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PATRICK CAHILL vs. LELIA S. LEE and JOHN BOYKIN LEE, her husband.

*Right of Distress by a Landlady, an Agreement by her Husband to the Contrary—Construction of Stat. 2 W. & M., ch. 5—Appraisers, Notice of Distress and Sale—Questions for the Jury—Measure of Damages in an action for an alleged Illegal Distress.*

A tenant's property was distrained on by Mrs. L., for rent in arrear due her. The tenant had previously agreed in writing to surrender his lease to Mrs. L.'s husband in his own right. He acted as her agent to collect her rents. There was no proof that Mrs. L. authorized or ratified the agreement or a suspension of her right of distress. In an action against Mrs. L. and her husband to recover damages for an alleged illegal distress, it was HELD:

That the tenant could not recover.

The phrase in Stat. 2 W. & M., ch. 5. of two "sworn appraisers," means that two indifferent persons shall be sworn to appraise the goods distrained according to the best of their understandings; they



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must be persons who are reasonably competent, but they need not be professional appraisers. An auctioneer and the watchman left in charge of lumber distrained in a lumber yard may appraise it.

Notice of distress and sale posted up on the premises, the lot leased being used by the tenant as a lumber yard, and also advertised once in a daily newspaper, conforms to the requirements of Stat. 2 W. & M., ch. 5.

An action will lie against a landlord upon the equity of Stat. 2 W. & M., ch. 5, for improper management of property taken under a distress for rent, and an improper offering of it for sale, so that it did not sell for the "best price" within the meaning of the provision of the statute, making it lawful for the landlord to sell. What will constitute such mismanagement as will make the distrainer liable, must depend upon the circumstances of each case, and the character of the property seized and sold.

The jury should be allowed to consider, in an action for damages against a landlord for an alleged illegal distress, evidence produced as to whether lumber taken under the distress, was properly lotted and exhibited for sale, and whether in consequence of mismanagement in this respect, it sold for less than it otherwise would. In such a case, if the jury found for the plaintiff, the measure of damages would be the fair market value of the lumber at the time and in the condition it was, when seized, less the amount of rent discharged by the proceeds of the sales of it actually made.

APPEAL from the Superior Court of Baltimore City.

The case is stated in the opinion of the Court.

*Exceptions.*—At the trial the plaintiff took four exceptions, which are substantially stated in the opinion. The evidence being all in, the plaintiff offered the following prayers:

1. That if the jury shall find from the evidence, that the plaintiff, P. Cahill, was in possession of a leasehold of land on Cathedral Street, which he used as a lumber yard, and carried on there the business of a lumber dealer, and that prior to 1874 he held said lease under a certain Thomas Symington, subject to an annual ground rent of

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\$514.67, payable in two sums, due respectively on the 10th April, and the 10th of October, on each of said days, a semi-annual payment of \$257.33; and that on or about the 28th April, in the year 1874, he received a written notice from one of the defendants, J. Boykin Lee, announcing that he, the said J. Boykin Lee, had bought out the estate of said Symington, and that thereafter the aforementioned semi-annual rent would be payable to him, and that in said written note he referred to a deed conveying to him the interest of said Symington, as of record in the Land Records, which said deed was in fact not a deed to him, the said J. Boykin Lee, but to his wife, Lelia S. Lee, co-defendant in this action, and that the said Cahill thereafter, did accordingly pay to the said J. Boykin Lee, the said semi-annual rents as they fell due, up to the 10th October, 1878, and that said J. Boykin Lee, acting as agent for said wife, and duly authorized by her so to do, did collect the said rents and sign receipts for the same in his own name, then the jury are at liberty to infer that the said J. Boykin Lee was authorized to make upon a valuable consideration, an agreement binding upon her and upon him, for an extension of time for the payment of said rent, provided the same was a reasonable time, and that when the rent for the six months ending April 10th, 1879, fell due, the said J. Boykin Lee, took no proceedings to enforce the collection of said rent until April 22nd, 1879, and that having already extended the time for collecting said rent from April 10th to April 22nd, he was authorized to extend it eight days longer until the 1st May, and the jury shall further find, that on the 22nd April, the said J. Boykin Lee did make an agreement with the plaintiff, Cahill, to further extend the time for the collection of said rent over-due, until the 1st May, and that said extension was a reasonable time, and that in consideration of said extension, the said J. Boykin Lee procured the plaintiff to sign the paper offered

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in evidence in the handwriting of said Lee, and signed P. Cahill, then the said agreement was valid, and operated as an extension of time, to pay said rent until the first day of May, and binding upon the said defendants, and if the jury shall further find, that the said Lelia S. Lee did, on the 30th April, in disregard of said agreement, distrain on the lumber yard of said Cahill, for the said rent due on April 10th, and sold out the property of said Cahill, and broke up his business and injured his credit, then the plaintiff is entitled to recover.

2. If the jury shall believe from the evidence of P. Cahill, the plaintiff, that for a valuable consideration moving to these defendants, the defendant, J. Boykin Lee, acting as agent for his wife, Mrs. Lelia S. Lee, agreed, on April 22nd, 1879, to delay proceedings for the collection of the arrearages of ground rent, which fell due on April 10, of that year, until May 1st, a period of eight days, and shall further find, that notwithstanding said agreement, the said Lelia S. Lee did distrain on 30th April, whereby the property of the plaintiff was sold, his business broken up, and his standing as a lumber merchant greatly prejudiced; then the plaintiff is entitled to recover in this action, and that the measure of damages must be twice the value of the goods thus sold, and compensatory damages for the injury to the plaintiff's business.

3. That if the jury shall find from the evidence that the lumber, goods and chattels, &c., seized and sold under the distraint proceedings, offered in evidence by the defendant, were sold in an improper manner, and not properly exhibited or described, so as to bring the best prices, and that by reason of said improper manner of sale and exhibition, they did not bring the best prices, then they must find for the plaintiff on the second count in the declaration, and that the measure of damages must be the fair value of said goods and chattels, and lumber distrained upon, less the amount of rent discharged by the produce of said sale.

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4. That the notice served upon the plaintiff, of the distress offered in evidence, was not sufficient and that the plaintiff is entitled to recover, and that the measure of damages must be the fair value of said lumber, goods and chattels sold under said distraint proceedings, less the amount of rent discharged by the produce of said sale.

5. That the paper in the hand-writing of J. Boykin Lee, and signed by P. Cahill, bearing date April 22nd, 1879, taken in connection with the facts in evidence, was an equitable surrender of the leasehold estate of P. Cahill to the defendant, Lelia S. Lee, and operated as an acquittance to the said Cahill of the rent due on April 10th, 1879.

And the defendants offered three prayers; the second is stated in the opinion; the third need not be stated; the first is as follows:

That if the jury believe from the evidence that the defendant, Lelia S. Lee, was the owner of the ground rent issuing out of the lot in question on the 30th April, 1879, and that on that day six months rent for the period ending April 10, 1879, was unpaid, and that the amount of rent so unpaid was two hundred and fifty-seven dollars and thirty-three cents, that then the said Lelia S. Lee, had a right to distrain for said rent so unpaid, and that there is nothing in the paper dated April 22, 1879, affecting her said right.

The Court (GILMOR, J.,) rejected the plaintiff's prayers and granted the first and second prayers of the defendants, and rejected their third prayer. The plaintiff excepted, and the verdict and judgment being for the defendants, the plaintiff appealed.

The cause was argued before BOWIE, GRASON, MILLER, ROBINSON and IRVING, J.

*Wm. H. S. Burgwyn and Innes Randolph*, for the appellant.

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*Randolph Barton and Skipwith Wilmer, for the appellees.*

MILLER, J., delivered the opinion of the Court.

In this case an action was brought by a tenant against a married woman and her husband, to recover damages for an alleged illegal distraint made by the wife as landlord. The declaration also contains a count averring that the property distrained was so improperly exhibited and allotted for sale, that it did not bring the best prices, but sold for much less than its fair value.

1st. The first ground of complaint is that the distraint was premature. The undisputed proof in the case shows that the plaintiff, Cahill, in 1868, took from Symington, a sub-lease for ninety-nine years, renewable forever, of the lot and premises upon which the property distrained was found, at an annual ground rent of \$514.67, payable in equal instalments on the 10th day of April and October in each year. In 1874, Symington sold and conveyed his interest in the premises to the defendant, Mrs. Lelia S. Lee, and the deed of conveyance was duly recorded in April of that year. Cahill thereafter regularly paid the rent to Mr. Lee, the husband, up to the 10th of October, 1878, and the distraint by his wife was made on the 30th of April, 1879, for the six months rent of \$257.33, due on the 10th of April, 1879. The plaintiff contends she had no right to distrain at this time, because of a certain written agreement between him and her husband made on the 22nd of April, the effect of which he insists, was to work either an equitable surrender of his lease to her, and an acquittance to him of the rent then due, or an extension of the time for payment thereof until the first day of May, and therefore no distress could be lawfully made until after that day. The plaintiff also offered proof, (which the Court rejected,) tending to show that apart from this written agreement, there was an independent collateral parol contract made at the same time by Mr.

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Lee, that no proceedings for collecting the arrearages of rent should be taken until after the first of May, or for a reasonable time after the 22nd of April. Mr. Lee in his testimony, and on cross-examination by the plaintiff, denied that any such parol agreement was ever made, but whether it was or not, or whether the written agreement, if it had been made by Mrs. Lee herself, could when properly construed, be held a release of all rent then due, or whether such parol agreement was inconsistent with the terms of the written agreement made at the same time, and therefore no proof of it could be offered, are all questions not necessary to be decided. By the written agreement, Cahill agreed to surrender his lease not to Mrs. Lee, but to J. Boykin Lee in his own right, and not as agent of his wife, and her name is not mentioned in the paper. There is no proof whatever in the record, that Mr. Lee had any authority from his wife to make this agreement on her behalf, or to enter into any arrangement or understanding with her tenant, by which her right to distrain could be suspended, postponed or in anywise affected, or that she ever ratified or adopted, or even knew of any such agreement or understanding. He was simply her agent to collect the rent. This is all the authority he was entrusted with by her, and we are all clearly of opinion that this agency did not carry with it the power to make such agreements as these. It follows, therefore, that there was no error warranting a reversal of the judgment, in the rulings of the Court below in the first, second, third and fourth exceptions, nor in granting the defendant's first prayer, and rejecting the first, second and fifth prayers of the plaintiff.

2nd. It has also been argued, that there was irregularity in the appraisement, and that the notice of the distraint and sale was insufficient. But we find nothing substantial in either of these points. The Code, (*Art. 63, sec. 13.*) provides that not more than two appraisers

shall be summoned, and prescribes their compensation. The Statute of 2 *W. & M.*, *ch.* 5, declares that the goods shall be appraised by two "sworn appraisers," and this phrase merely means that two indifferent persons shall be sworn to appraise the goods distrained according to the best of their understandings. They must be persons who are reasonably competent, for otherwise it would be an abuse of the statute, but they need not be professional appraisers. *Roden vs. Eyton*, 60 *Eng. C. L. Rep.*, 427. The appraisers in this case were the auctioneer and the watchman, who was left in charge of the property distrained, which consisted chiefly of lumber in a lumber yard, but there is no proof in the record to show they were not reasonably competent persons, though they may not have been lumber merchants or specially acquainted with the lumber trade. The same statute also provides that notice of the distress taken, with the cause of such taking, is to be left at the chief mansion house or other most notorious place on the premises charged with rent distrained for. Here the leased lot was used by the tenant as a lumber yard, and the notice of the distraint and sale was posted upon the premises, and was also advertised once in the Baltimore Sun newspaper. In form it is substantially the same as that set out in *Latrobe's Justice*, *sec.* 816, and we find no valid objection to it. In these respects, therefore, there has been no substantial departure from the requirements of the statute, and the Court was right in rejecting the plaintiff's fourth prayer.

3rd. We come now to consider the case made under the second count of the declaration, which charges that the property seized was not properly lotted and exposed for sale, and, therefore, did not bring the best price, or its fair value. The manner of sale in such cases is not prescribed by our Code, nor by the Statute of 2 *W. & M.*, *ch.* 5. The latter statute simply makes it lawful for the landlord, in case the tenant fails to replevy within five

days, "to sell the goods and chattels so distrained, for the best price can be gotten for the same towards satisfaction of the rent." Under this provision, if the goods be prepared and offered for sale in a reasonable manner, and the sale be fairly conducted at public auction, (and in a case like the present on the premises) the price realized will be presumed to be "the best that can be gotten for them," and the landlord will not be responsible. But it is well settled, that an action will lie against the landlord upon the equity of this statute, for improper management of the property, and an improper offering of it for sale, so that it did not sell for the best price within the meaning of this provision. *Mayne on Damages*, 323; 1 *Addison on Torts*, 663. Thus in *Poynter vs. Buckley*, 5 *Carr. & Payne*, 512, there was an action for an excessive distress, with a count for not selling at the best prices, and the plaintiff proposed to show, that the property distrained, which consisted of materials used by coachmakers, was kept in the rain, and that at the sale the articles were *not properly lotted*, and, therefore, did not sell for a good price. TINDAL, C. J., held the evidence was admissible, because the mismanagement imputed was so nearly connected with the sale, and it was alleged, that in consequence of this mismanagement and neglect, the property did not sell at better prices. The cases of *Ridgway vs. Lord Stafford*, 6 *Excheq.*, 404, and *Frusher vs. Lee*, 10 *Mees. & Wells.*, 709, are other instances of such actions being brought and maintained. What will constitute such mismanagement as will make the distrainer liable, must depend upon the circumstances of each case, and the character of the property seized and sold. For instance, it would be wholly unwarrantable to sell in one lump, and at one offer, all the furniture in a dwelling-house, or all the goods in a shop or store. In such cases it is manifest the property should be properly lotted and sold in parcels. Here, as has been stated, the property



distraigned, consisted mainly of lumber in a lumber yard, and was sold for about \$300. The plaintiff offered evidence to the effect, that the appraisers collected the lumber into sixty lots, "shaping it up," as they called it, whereby the valuable lumber, and that of a lower grade was mixed, and that he complained of the mode in which the sale was being made, but his complaints were disregarded. He further offered the evidence of dealers in lumber, and practical builders, who were present and purchasers at the sale, that the fair value of the lumber properly exhibited, and lotted was \$1000; that it would have sold for a better price if it had not been "shaped up," as the appraisers called it, that the auctioneer made no mention of the quality or quantity in the several lots sold, that it was impossible without pulling the piles to pieces in some cases to know what was being sold, owing to the manner in which the lots were shaped up, and in consequence purchasers bid much less than they otherwise would, had they known the number of feet and quality of the lumber they were buying, and that in consequence of this mismanagement and improper allotment, it brought much less than its fair value. On the other hand, proof was offered by the defendants, to the effect that the lumber was fairly lotted and exhibited, that it was not necessary to take it to pieces, in order to find out what was in the several lots, that it brought its fair value, and that the sale was in all respects fairly conducted. It is not our province to determine these questions of fact, or to express any opinion as to the weight of evidence. They should have been left to the finding of the jury, but it is plain that this was not done. The Court not only rejected the plaintiff's third prayer, but granted the second prayer of the defendants. By the granting of this latter prayer, the jury were instructed on this point in plain terms, that their verdict must be for the defendants, provided they found that the landlord proceeded to sell the lumber at

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public auction to the highest bidder. It is clear that under this instruction, the jury were forbidden to consider the questions whether the lumber was properly lotted and exhibited for sale, and whether in consequence of mismanagement in this respect it sold for less than it otherwise would. This in our opinion was error, and for that error the judgment must be reversed and a new trial had. In so deciding, we do not mean to say the plaintiff's third prayer was correct, and ought to have been granted. It is undoubtedly open to the criticism of the appellee's counsel, that it was calculated to mislead the jury, because of the way in which the terms "best prices" are used in it, and it is also faulty in other respects. The damages in such cases depend upon the actual loss the plaintiff can prove. *Mayne on Damages*, 325. The jury should have been instructed to the effect that if they found from the evidence that the lumber seized and sold under the distraint proceedings, was not lotted and exhibited for sale in a reasonable and proper manner, and in consequence thereof, it failed to sell at better prices than were obtained for it at the sale, then they may find for the plaintiff under the second count in the declaration, and the measure of damages is the fair market value of the lumber at the time, and in the condition it was when seized, less the amount of rent discharged by the proceeds of the sales of it actually made.

*Judgment reversed, and  
new trial awarded.*

(Decided 21st January, 1881.)

CHARLES TREUSCH vs. THOMAS J. SHRYOCK and  
GEORGE L. CLARK.

*Proof under a Mechanic's Lien Claim of the Date of Delivery of  
Materials—Law of the Case—Judgment under a Mechanic's  
Lien Claim.*

Art. 61, sec. 19, of the Code, requires the time when the work is done or materials furnished to be stated in the mechanic's lien filed; but if by accident or mistake, and without fraud, the date is erroneously entered, and the proof establishes the doing of the work or the actual delivery of the materials which are charged, and supplies the correct date, which is within the time allowing the lien to be filed, the error cannot be availed of to defeat recovery.

Where an objection to a prayer raised on a second appeal, was not before this Court on the former appeal, and could not be, for it did not appear in the exceptions to have been raised in the Court below, such prayer (so far as this objection is concerned) could not be held to have received the approval of this Court, and to be the law of the case to the end.

A judgment under a mechanic's lien claim against several houses should be for the specific sum due on each house.

**APPEAL from the Superior Court of Baltimore City.**

The former appeal in this case is reported in 51 *Md.*, 162. The subsequent proceedings are stated in the opinion. The judgment entered in the Court below was "for the plaintiffs for \$1053.83, with interest thereon from date until paid, and costs" on a verdict "for the plaintiffs for \$1053.83."

The cause was argued before BARTOL, C. J., GRASON, MILLER, ROBINSON and IRVING, J.

*John B. Wentz*, for the appellant.

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Treusch vs. Shryock & Clark.

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*Fielder C. Slingsluff*, for the appellees.

IRVING, J., delivered the opinion of the Court.

This was a proceeding taken on the part of the appellees to enforce a mechanic's lien, and has been before this Court on a former appeal; but upon questions not now presented.

The first exception brings up for review the correctness of the Court's action in granting the appellees' prayer. That prayer is in the following words: "The plaintiffs pray the Court to instruct the jury, if they find from the evidence in the case, that the defendant, O'Connor, was employed by the defendant, Treusch, to build for him the houses in question, and that the defendant, O'Connor, contracted with the plaintiffs to furnish him the lumber necessary to build said houses, and that the plaintiffs did deliver said lumber to said O'Connor, including the item of the 4th of November, A. D., 1876, under said contract, and that notice of the plaintiffs' intention to lay said lien was given the defendant, Treusch, within sixty days from the date of the last delivery of lumber, and that the said lien was duly filed within the time required by law, and that the contract between said Treusch and O'Connor was not at an end on the 4th day of November, 1876, the date of the last delivery, and that the houses had not been accepted in good faith on or prior to the said 4th day of November, 1876, by the defendant, Treusch, then the plaintiffs are entitled to recover the amount of their lien claim, with interest from the 9th of March, A. D., 1877."

The appellant objected to the granting of this instruction for the want of sufficient evidence to support it. "The particulars, in which the proof is supposed to be defective," and all the evidence connected with the supposed defect, have been stated in the bill of exceptions in accordance with the fourth rule of this Court.

The special particulars wherein the evidence failed, as contended by appellant, are:

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1st. As to the delivery of the item in the lien claim filed, charged as of June 20th, 1876, amounting to \$71.05.

2nd. That the dates stated in the lien claim as the dates of deliveries are not the dates of delivery.

Notwithstanding the dates in the lien claim do, in some instances, appear to be in error, yet the proof seems to have established the actual delivery of the several articles charged, though on other days than those named in the lien; except as to the item of June 20th, 1876, amounting to \$71.05. The nineteenth sec. of Art. 61 of the Code does require the time when the work is done or materials are furnished to be stated in the lien filed; but if by accident or mistake, and without fraud, the date is erroneously entered, and the proof establishes the doing of the work or the actual delivery of the materials which are charged, and supplies the correct date, which is within the time allowing the lien to be filed, we do not think the error can be availed of to defeat recovery. Any supposed errors, therefore, in the dates of delivery named in the lien, and corrected by the proof, furnish no substantial ground of objection to the prayer. But as to the item charged in the lien as of June 20th, 1876, amounting to \$71.05 according to the certificate of the proof in the bill of exceptions, the evidence wholly failed. From the receipts offered in evidence no delivery of that date is established; and it does not appear that the articles charged as of that date were delivered at another time. In fact the Judge certifies, there was no other evidence of delivery of that item, and no receipt for it. In that state of the proof it was clear error, on the part of the Court, to instruct the jury if they find the facts recited in the prayer, "the plaintiffs were entitled to recover the amount of their lien claim, with interest from the 9th of March, A. D., 1877." That language had not been preceded with any statement that the jury were required to find the actual delivery of all the materials charged in the

lien. It only required them to find a contract to supply the lumber necessary to build the houses and had supplied it. It did not follow, that the item alluded to was necessary for that purpose. If it was supplied for that purpose, and was not used, it would make no difference, so far as the liability and lien were concerned, if it was actually ordered and delivered. It being found unnecessary could not deprive the plaintiffs of their right to recover. The supply of what was necessary, therefore, did not of necessity cover this item, and it was misleading to the jury to instruct as was done. If instead of the concluding language of the instruction already quoted, the jury had been instructed that "then the plaintiffs are entitled to recover the several items of their lien claim which the jury may find to have been actually delivered," no objection could have been made to the instruction. Some language should have been employed to direct the mind of the jury to the fact, that they were to find all the items actually furnished, for which they rendered their verdict. When this case was before this Court on the former appeal, the appellees' prayer was held defective for reasons which are now obviated. The objection now raised was not then before the Court, and could not be, for it did not appear in the exceptions to have been raised in the Court below. The prayer, therefore, in its present form, cannot be held to have received the approval of this Court and to be the law of the case to the end, as has been contended.

As a new trial will be ordered, it is not necessary for us to say anything with reference to the questions embraced in the second bill of exceptions, except to say that the judgment as rendered, was erroneous. It is a judgment *in personam* instead of *in rem*. The jury, by their verdict, ought to have found the specific sum due on each house, and the judgment should have been entered accordingly. That is in accordance with the practice and the former rulings. *Plummer vs. Eckenrode*, 50 Md., 234;

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*Wilson vs. Merryman*, 48 Md., 330. Inasmuch as this defect can be cured in this case in a way which is certainly right, it is unnecessary for us to decide the question whether, if there was no other error, the Court could not correct it and apportion the judgment between the several houses.

*Judgment reversed, and  
cause remanded.*

(Decided 21st January, 1881.)

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FREDERICK and AUG. WEHR, trading as F. & A.  
WEHR vs. THOMAS J. SHRYOCK and GEORGE R.  
CLARK, trading as SHRYOCK & CLARK. JOHN W.  
PHILLIPS, CHARLES ROGERS, ALEXANDER HORNER  
vs. THE SAME. JOHN WARD vs. THE SAME.

*Notice to Owner under Mechanics' Lien Law—Proof of  
Notice in Proceedings in Equity.*

Under Art. 61, secs. 11 and 19, of the Code, it is a fatal defect for lienors not to give notice to the owners or reputed owners of the houses and lots, of their intention to claim a lien.

Where the lien claim filed (which is the basis of proceedings to recover the amount claimed, whether by *sci. fa.* or bill in equity) required that notice should be given to the owners of the houses and lots, and the bill averred that due notice was given to the owners, no decree could be rightfully passed without proof that the notice was given as alleged.

APPEALS from the Circuit Court of Baltimore City.

Joseph C. and Samuel Merritt owned the land on Wolfe street, on which the four houses mentioned in the

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*Wehr, et al. vs. Shryock & Clark.*

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opinion of the Court were afterwards erected. They entered into two agreements with John W. Phillips, both dated the 13th December, 1877. Under the first agreement, the Merritts agreed to lease to Phillips six lots of the Wolfe street ground for ninety-nine years, at a certain yearly rental per lot, provided Phillips erected on each lot a house; and provided further, that he fully complied with the terms of the other agreement, which was, in substance, to build for the Merritts five houses, on five lots adjoining the six mentioned in the first agreement, on terms in the second agreement mentioned, which were that the Merritts were to execute the leases for the six lots, on the satisfactory completion of their five houses, and release of all liens or claims against them or their houses, which releases Phillips agreed to procure, and the Merritts were to pay for the houses built for them in instalments at certain stages in the progress of the building; the balance of the contract price of the houses built for them to be paid in a note at four months, after the entire completion of said houses, and release of all liens and claims that might be against the houses. In May, 1878, leases were executed by the Merritts of three of the four lots liened on. The case is further stated in the opinion of the Court.

The cause was argued before BOWIE, GRASON, MILLER, ROBINSON and IRVING, J.

*Albert Ritchie*, for the appellants, F. & A. Wehr.

*Edward J. Clark*, for the appellants, Phillips and others.

*Abraham Sharp*, for the appellant, John Ward.

*John B. Wentz*, for Joseph C. and Samuel Merritt.



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Wehr, *et al.* vs. Shryock & Clark.

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*Fielder C. Slingluff*, for the appellees.

MILLER, J., delivered the opinion of the Court.

It is well established that a mechanic's lien is purely the creation of statute law, and to maintain and enforce it the requirements of the statute must be substantially complied with. *Soldini vs. Winter*, 32 Md., 130; *Hess vs. Poultney*, 10 Md., 257; *Gault vs. Wittman*, 34 Md., 35.

In the present case the appellees, who were lumber merchants in the City of Baltimore, on the 12th of June, 1878, filed their claim in the usual form of a mechanic's lien for the sum of \$552.27, against four houses on the east side of Wolfe street and the lots of ground appurtenant thereto," of which said houses, and lots Joseph C. Merritt and Samuel Merritt are the *owners or reputed owners*, and John W. Phillips *builder and contractor*; said claim, of which a bill of particulars is hereto annexed as part hereof, being for materials furnished in and about the erection and construction of said houses, within six months last past, *at the request* of said John W. Phillips." Upon its face, therefore, the claim is one clearly falling under sec. 11, Art. 61, of the Code, which provides that if the contract for work or materials is made with any architect or builder, or any other person except the owner or owners of the lot on which the building may be erected, the party doing the work or furnishing the materials *shall not be entitled to a lien*, unless within sixty days after furnishing the same, he shall give *notice* in writing to such owner or owners of his intention to claim such lien. In sec. 19 of the same Article, it is provided, among other requirements, that the claim shall set forth the name of the claimant, and of the owner or reputed owner of the building, and also of the contractor or architect, or builder where the contract was made by the claimant with such contractor, architect or builder.

In cases falling under these provisions, not only does the statute in express terms, make the giving of this

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notice to the party named as owner or reputed owner, essential to the lien, but the failure to give it, in substance, as the law provides, has in repeated instances been held fatal to the claim. *Hess vs. Poultney*, 10 Md., 257; *Thomas vs. Barker*, *Ibid.*, 380. In the case last cited, the lien claim as filed, the *scire facias*, and the sheriff's published notice, described Thomas, as the owner or reputed owner of the house and lot, and Kridler, as the contractor, builder and architect, to whom the materials were furnished by the claimants, and it was held that Thomas must be regarded as the owner, and that the claimants *could not recover*, because they had not given to him the sixty days' notice, in substance as required by the lien laws.

In the case now before us, it is conceded no such notice was ever given by the claimants to Joseph C. Merritt and Samuel Merritt, the parties named in the lien claim as the owners, or reputed owners of these houses and lots, and this, in our opinion, is a fatal defect. The law provides that proceedings to recover the amount claimed, or in other words, to enforce the lien, shall be either by bill in equity or by *scire facias*. *Code, Art. 61, sec. 24*. But whether the one or the other mode be adopted, the lien claim previously filed is the foundation of the proceeding and recovery, either by decree or judgment, is dependent upon substantial compliance with the requirements which the law has made indispensable to the existence of the lien. Here the proceeding was by bill in equity filed by the claimants on the 13th of June, 1878, just after they had filed their lien claim. The bill follows the averments of their claim, and charges that the complainants in 1877 and 1878, sold and delivered certain lumber to Phillips which he used in building certain houses on the east side of Wolfe street, and that afterwards and within six months of the time of sale and last delivery, they filed in the Superior Court of Baltimore City, their lien against the

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houses and adjacent lots for the sum of \$552.27, a certified copy of which is filed with and made part of the bill; that Joseph C. Merritt and Samuel Merritt were the joint owners of the lots at the time of said building, and that John W. Phillips was the builder and contractor with them; and that before filing their said claim they gave the said Joseph C. Merritt and Samuel Merritt notice within sixty days of last delivery, of their intention to file the same and the necessary particulars thereof as required by law. The case made by the bill concedes it was one in which notice to the parties named as owners or reputed owners was necessary, and avers that it was given. Under this bill and the claim as it stands, no decree could be rightfully passed without proof that the notice was given as alleged, and no such proof was offered. In our opinion there is nothing in the contracts between the Merritts and Phillips of the 13th of December, 1877. Which, upon the case made by the lien claim and the bill, dispensed with the necessity of giving this notice. If the purpose of the claimants was to reach and affect only the interest in these houses and lots, which Phillips acquired under these contracts, they should have filed their claim in a different form. Whether under the power of amendment contained in sec. 41 of Art. 61, they could have so amended their claim, and the proceedings thereon as to subject this interest alone to the lien, is a question not before us, and in regard to it we express no opinion. They have not sought so to amend, but have stood upon the claim and bill as originally filed. We are therefore compelled to reverse the decree and dismiss the bill.

*Decree reversed, and  
bill dismissed.*

(Decided 21st January, 1881.)

GEORGE M. GILL, JOHN STEWART and HUGH SISSON  
vs. CHARLES G. CARMINE.

*Liability of Trustees in their Individual Capacity—Order of Court.*

Defendants to whom a deed in trust was made of property for the benefit of the grantor's creditors, and who were authorized by order of a Court of equity to complete certain houses thereby conveyed to them, in course of building when the deed was made, are responsible in their individual capacity, for work and materials furnished by a plaintiff upon their order, for the completion of the buildings, it appearing that there was no agreement on his part to look to the trust estate alone for payment. The order of Court was an indemnity to the trustees for having the work done, to be allowed them out of the trust funds.

APPEAL from the Court of Common Pleas.

The appellee instituted this suit to recover from the appellants for work done and materials furnished by him as a plumber and gas fitter, at their request and by their order and direction.

The record in this case shows that Michael Roche, a builder, in 1877, executed to the appellants a deed in trust of all his estate and property for the benefit of his creditors. As appears from the deed, there were certain houses unfinished conveyed to the appellants, the completion of which, Roche declared in the deed, would greatly swell his assets, but which he was unable to finish and hoped his trustees would do so. The appellants assumed the trust, took charge of the property and proceeded to complete the unfinished houses, having first filed a petition in the Circuit Court of Baltimore City, asking that the trust might be administered by them under the direction

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of the Court, which petition was granted. Upon the further petition of the appellants as trustees, and at the instance of creditors of Roche, the Circuit Court passed an order authorizing the trustees, before making sale, to complete seventeen unfinished houses (among which were the houses, upon and to which the work and materials claimed for in this suit were done and furnished) and to pay for the same out of such amounts as might be received from the trust estate.

It further appears, that the appellee, who had done work for Roche, prior to the assignment, was asked by the appellants' superintendent to furnish estimates for the several pieces of work, afterwards done by him. He received orders from one of the appellants at one time as to some of the buildings, and from another of the appellants at another time as to others of them, to go ahead and do the work, which he accordingly did. The appellee had stopped work for Roche just before the deed of trust was made, as Roche could not pay him. He looked to the appellants alone for the payment of his account, and so told them before he finished the work. All the work charged for in this case, it appears, was done for them alone. The houses were finished and sold by the appellants, who received the proceeds as trustees; the appellee filed his claim in the trust estate; an audit was ratified and the appellee received a part of his bill from the trust funds, stating, however, at the time, that he took it only on account, and that if it affected his right to recover the balance, he would not receive it. He was subsequently informed that there were no funds to pay the balance of his bill, and that he would receive nothing more: hence this suit.

*Exceptions.*—At the trial the plaintiff offered two prayers. It is necessary to state only the second, which is as follows:

If the jury shall believe from the evidence, that the plaintiff performed the work and furnished the materials,

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as charged by him, at the order and request of the defendants, then their verdict must be for the plaintiff, although they shall believe that the defendants were acting as trustees of the estate of Michael Roche, when said work and materials were ordered by them, unless they shall believe from the evidence that the plaintiff agreed to look to the trust fund alone for payment.

The defendants offered six prayers. It is necessary to state only the sixth, which, modified by the Court, is as follows :

If the jury believe from the evidence, that the plaintiff contracted with Michael Roche to furnish the materials and do the work on the houses on Boundary avenue, known as the Wilmer Houses, as shown in the proposal offered in evidence in this case, and that he never released the said Michael Roche, or his estate, and that the plaintiff in furnishing said materials and performing said work, did so to perform his part of the said contract, and did complete his part of the contract, then their verdict must be for the defendants as to the value of such work and material.

The Court, (BROWN, J.,) rejected the plaintiff's first prayer but granted the second ; and rejected all the defendants' prayers, except the sixth, which the Court granted after modifying it. To the granting of which prayer as modified, the defendants excepted, and the verdict and judgment being for the plaintiff, they appealed.

The cause was argued before BOWIE, GRASON, MILLER, ALVEY, ROBINSON, and IRVING, J.

*David Stewart and John Gill, Jr.,* for the appellants.

*W. E. Hoffman,* for the appellee.

ALVEY, J., delivered the opinion of the Court.

Under the instructions of the Court, given in the terms of the second prayer of the plaintiff, and the sixth prayer

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of the defendants, as modified by the Court, we must assume that the jury found that the work and materials furnished for the completion of the buildings, for which this suit was brought, were furnished upon the order and request of the defendants, and that there was *no agreement* on the part of the plaintiff to look to the trust estate alone for payment. That the contract was with the defendants is not denied; the only question is, whether the credit was given exclusively to the trust estate in the hands of the defendants as trustees, or whether they were looked to as responsible in their individual character.

The defendants contend that inasmuch as the completion of the buildings was contracted for under the sanction of the Circuit Court, as a Court of equity, therefore there could be no individual responsibility contemplated or incurred. But that was by no means the necessary consequence of the order of Court, authorizing the defendants as trustees to have the work done. The order of the Court was a complete indemnity to the trustees for having the work done, and a determination that the cost or expense of the work should be allowed the trustees out of the trust funds. But it did not bind the plaintiff to look exclusively to the trust funds for payment, whether sufficient or not, unless, by agreement, he should bind himself to look to that fund exclusively.

By the deed of trust from Roche to the defendants, the latter were invested with the entire estate of the former, for the benefit of creditors; and the law is perfectly well settled, that the party holding the estate in trust, even with general powers of management, is bound personally by the contracts that he may make as trustee, though he designates himself as such; "and nothing will discharge him but an express provision, showing clearly that *both* parties agreed to act upon the responsibility of the funds alone, or of some other responsibility, exclusive of that of the trustee; or some other circumstance clearly indicating

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another party who is bound by the contract, and upon whose credit alone it was made." 1 *Pars. Contr.*, (4th Ed.,) 102.

This principle has long since been settled in the law, and was fully recognized and acted upon in the case of *Horsley vs. Bell*, *Ambler*, 770; more fully reported in a note to the case of *Cullen vs. Queensberry*, 1 *Bro. C. C.*, 101, and the authority of which was fully sanctioned in the case of *Eaton vs. Bell*, 5 *Barn. & Ald.*, 34. And in the recent case of *New vs. Nicoll*, 73 *N. Y.*, 127, where a trustee, holding and managing an estate for the benefit of a married woman, and others after her death, was sued on a contract for repairs done to the buildings on the land, it was held and laid down as a settled principle, that when a trustee is authorized to make an expenditure, and he has no trust funds, and the expenditure is necessary for the protection, reparation, or safety of the trust estate, and he is not willing to make himself personally liable, he may, by express agreement, make the expenditure a charge upon the trust estate. For, as it is there said, he could himself advance the money to make the necessary reparation or improvement, and he would have a lien upon the trust estate therefor; and that being so, he could, by express contract, transfer such lien to any other party who would agree, upon the faith of the trust estate, to make the necessary expenditure. But, in the absence of such express agreement, or circumstances plainly indicating an intention on the part of the party doing the work or making the expenditure, to exclude the personal liability of the trustee, and to rely exclusively upon the estate, or some other source, for payment, the trustee, at whose request the work was done or expenditure made, will be held personally liable. In such case, he must seek reimbursement from the trust estate.

In this case, it would hardly be rational to conclude that the plaintiff intended to do the work for the benefit



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of an insolvent estate, and to place himself upon the footing of a simple contract creditor, with the right to demand only a *pro rata* distribution with that class of creditors, however small that distribution might be. We must suppose that he intended either to do the work upon the credit of the estate, with the right to be paid in full, or that the work was done upon the individual credit of the trustees. This was matter of fact; and the jury have found, under the instructions of the Court, that the work was done, not alone upon the credit of the estate, but upon the personal credit and liability of the defendants. The unquestioned proof is that one trustee acted for all, and what was the order or direction of one was the order and direction of all. And the fact that the plaintiff made out a bill for the work done in completing the houses, and filed it in the case, and received a distribution thereon, was but a circumstance to be considered by the jury, in passing upon the question, whether the work was done upon the credit of the estate alone, or that of the individual liability of the defendants.

We perceive no error in the rulings of the Court, in granting the second prayer of the plaintiff, and refusing those on the part of the defendants.

*Judgment affirmed.*

(Decided 27th January, 1881.)

## THE STATE OF MARYLAND vs. HUGH F. SCARBOROUGH.

*Practice in Criminal Cases—Assignment of Errors—Grand Jury—Defective Plea in Abatement.*

An assignment of errors, "that in the record and proceedings, as also in the condition of the said judgment, manifest errors have happened, to the damage of the State, to wit: in overruling the demurrer of the State to the defendant's fifth plea to the indictment," is not sufficient under Rule 1, of the Court of Appeals.

As it is a presumption of law that a grand jury was legally and regularly drawn and empanelled, a plea in abatement should expressly negative such presumption, upon the averment, that the jury consisted of only twenty-two persons, at the time an indictment was found.

## APPEAL from the Circuit Court for Harford County.

The appellee was indicted in the Circuit Court for Cecil county for assaulting one Samuel L. Welde with intent to murder. He made a suggestion and affidavit that he could not have a fair and impartial trial in that Court, and thereupon his case was removed to the Circuit Court for Harford County.

In the Court last named, he filed five pleas to the indictment. The fifth plea averred that "the pretended grand jury, by whom the said indictment and the presentment on which the same was founded, consisted and was composed of only twenty-two persons, and was, for that reason, incompetent to act as a grand jury and find said indictment." The State's Attorney thereupon demurred to the fifth plea.

The Court (WATERS, J.) overruled his demurrer, holding that the matter contained in that plea was sufficient in law, and adjudged that the indictment should be quashed.

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The State's Attorney thereupon filed a petition for the removal of the record in said case into this Court, as upon writ of error; and the record was transmitted to this Court. The assignment of errors is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., ALVEY, ROBINSON and IRVING, J.

*Charles J. M. Gwinn, Attorney-General*, for the plaintiff in error.

It was provided by a law, applicable to Cecil County, that the Circuit Court for that county, at the beginning of its term, should select one person from the forty-eight persons, drawn and summoned to attend as jurors at such term, to be foreman of the grand jury; and that twenty-two other names should be drawn under the direction of the Court, by its clerk, from a box containing the names of the remaining forty-seven jurors; and that the twenty-two persons, whose names were thus drawn, should, together with the foreman so previously selected, constitute the grand jury for the term, and the remaining twenty-five names should constitute the petit jury for said term. 1878, *ch. 369, sec. 5*; *Rev. Code of 1878, Art. 62, sec. 5, p. 561*. This provision is mandatory, in the strictest sense of that word, and no grand jury can be legally constituted, in Cecil County, unless the directions given by this Act are substantially pursued. A foreman of the grand jury must be appointed by the Court from the forty-eight jurors drawn and summoned, as provided by law, and twenty-two other names must be drawn from that panel for the purpose of constituting the grand jury. The fifth plea, however, does not allege that the requirements of the law, in this particular, were not observed.

There is a verbal inaccuracy in the plea, which must be supplied by interpolating the words "were found," after

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the words, "was founded," in its second line. But if this be done, there remains only an averment, in substance, that the pretended grand jury, by *which the indictment was found* "consisted, and was composed, of only twenty-two persons, and was, for that reason, incompetent to act as a grand jury." The proposition thus stated is wholly untenable. If the foreman and twenty-two other persons, had been, originally, duly selected and qualified as grand jurors, the body, thus constituted, remained a duly qualified body, during the term for which it was selected, though a minority of its members died, or failed to attend. It is true that every presentment, or indictment, made, or found by such grand jury, was required to be so made, or found, by at least twelve of their number; but it was not necessary that any greater number of grand jurors should be present, or concur, when any such presentment, or indictment, was made, or found. 5 *Bacon's Abridg., Tit. Juries, A.* 1 *Chitty's Crim. Law, (5th Am. Ed.)* 322. If, therefore, it happened that the body, by which this particular indictment was found, had been reduced by death to the number of twenty-two, or to any number greater than twelve, such grand jury did not become incompetent to present or indict.

If the objection, intended to be taken, was not to the number of the members of the grand jury, as constituted when the indictment was found, but to its rightful existence as a body because of an original and unsupplied defect in its numbers in its *original formation*, such objection ought to have been made by direct averment. It was not so made. The defect is not aided by the demurrer, because the demurrer admitted no facts except those which were well pleaded. *Brooke vs. Widdicombe*, 39 *Md.*, 400, 401.

*H. W. Archer*, for the defendant in error.

It is admitted by the State, that under the provisions of our law, a foreman and twenty-two other jurors—in all

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twenty-three jurors—are required to constitute a legally organized grand jury, and this is the precise and only point that was presented by the demurrer, and decided by the Circuit Court. The plea does not allege that the jurors, who were in attendance, or who found the bill, were only twenty-two in in number. But the allegation is, that “the pretended grand jury,” (the body as organized,) “consisted and was composed of only twenty-two persons,” and was therefore not a legally constituted grand jury, and was incompetent to act as such. This was the plain intent and meaning of the plea, and it was manifestly so understood and decided upon by the Circuit Court.

ALVEY, J., delivered the opinion of the Court.

The petition and assignment of error, upon which this case has been brought into this Court, must be dismissed. There is an entire failure to make any such assignment of error as is required by Rule 1, in respect to Appeals and Writs of Error, 29 *Md.*, 1. The rule requires that the party applying to have the record removed as upon writ of error, *shall plainly designate the points or questions of law*, by the decision of which he feels aggrieved; and this Court is forbidden to hear or determine any point or question not thus plainly designated in the petition.

The only assignment of error made in this case is, “that in the record and proceedings, as also in the rendition of the said judgment, manifest errors have happened, to the damage of the State, to wit: in overruling the demurrer of the State, to the defendant’s fifth plea to the indictment.”

Now, a demurrer puts the legality of the whole proceedings in issue (1 *Chitty Cr. L.*, 358,) and requires the Court to go back to the first error apparent on the face of the record. That being so, the object of the Rule, requiring special assignment of errors, was to prevent surprise, and the raising of new points and objections in this Court

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for the first time, and which, perhaps, if they had been suggested to the Court below, would have been met, and the necessity for bringing the record here avoided. To assign as error the overruling or sustaining a demurrer, or the overruling or sustaining a motion in arrest of judgment, without designating specially the point or question of law involved in the ruling of the Court below, is no sufficient assignment, within the meaning and object of the Rule. If the object in bringing this case here was to have reviewed the decision of the Court below in determining that the facts set out in the defendant's fifth plea were sufficient to abate the indictment; or that the Court, upon overruling the demurrer, instead of proceeding at once to quash the indictment, should have allowed the State to reply to the plea, and thus make an issue of fact; those points or questions should have been specially assigned and designated, as the ground for bringing the case to this Court. But, as we have seen, no such questions have been made by assignment under the Rule.

If the question of the sufficiency of the fifth plea in abatement were before us, we should have no difficulty in declaring it bad. The presumption of law is that the grand jury were legally and regularly drawn and empanelled; and it might be true, as averred in the plea, that the grand jury consisted of only twenty-two members at the time the indictment was found, and yet be a legally constituted, and a competent jury, even though it were conceded that the panel would be illegally constituted, and incompetent to act, if it had not originally consisted of twenty-three jurors; a question in regard to which we intimate no opinion. If one of the original panel had died, or been sick, or had been excused for any cause, it would in no manner have affected the legality of the panel, or the power and competency of the remaining jurors to act and find valid indictments.

It is a settled rule, that every dilatory plea must be pleaded with strictness, and be certain to every intent. 1

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*Boc. Abr., tit. "Abatement O," p. 34.* And it is consequently essential that the facts should be stated out of which the defence arises, or a negation of the facts which are presumed from the existence of a record; as in this case, the presumption that the grand jury were legally and regularly drawn and empanelled, according to law, should have been expressly negatived, upon the averment of the facts. *State vs. Brooks, 9 Ala., 10; 1 Whart. Cr. L., sec. 537.* The plea fails to aver that the panel never consisted of more than twenty-two jurors; and no presumption or intendment will aid the plea. The demurrer, therefore, should have been sustained. But, for defects already mentioned,

*Assignment of Errors  
dismissed.*

(Decided 27th January, 1881.)

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EDWARD F. JOHNS vs. THE STATE OF MARYLAND.  
SAME vs. SAME.

*Practice in Criminal Cases—Rule 1, of the Court of Appeals—Appeal under the Act of 1872, ch. 316—Finding of Facts under an Issue raised on a Plea in Abatement—A Plea in Abatement without Affidavit, a Nullity—Making up the Panel—Admissibility of Evidence—Act of 1872, ch. 329, relating to Defaulters—Art. 21, of the Declaration of Rights—Challenge of Juror—Objection to the Panel as made up.*

Where there was a demurrer to an indictment which was overruled, and after verdict of guilty, a motion in arrest of judgment, also overruled, and the traverser appealed under the Act of 1872, ch. 316, there being no final judgment, those rulings cannot be reviewed

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(not being brought into this Court as provided by Rule 1,) but only what is presented by the exceptions as allowed under the Act.

After the demurrer to an indictment had been overruled by the Court below, the traverser pleaded in abatement (not verified by affidavit,) that the grand jury by whom the indictment was found, had not been legally drawn, and was therefore not lawfully constituted, setting forth the particulars. The plea was traversed by the State, and the issue of fact tried before the Court. Evidence was offered in support of the averments, set out in an exception on an appeal by the traverser under the Act of 1872, ch. 316, but on the trial of that particular issue, no question appeared to be raised as to the admissibility of evidence or any distinct proposition of law made on which the Court was required to rule, there was no statement of facts in the record as having been found by the Court, but at the close of the evidence as set out in the exception, it is stated, the Court overruled the plea in abatement, and decided that the grand jury drawn from the box mentioned by a witness was legally constituted, and that the traverser should plead to the indictment.

**HELD :**

- 1st. That it was not the function of this Court to review the evidence contained in the exception, and find the facts that may have been the basis of the rulings of the Court below, and that it could not therefore review the rulings, there being no special finding of the facts spread upon the record, either in the form of a special verdict, or a special finding by the Judge.
- 2nd. That the plea in abatement, being a mere nullity for want of affidavit, was properly overruled.

It is no ground of objection by a traverser that the persons drawn or summoned as jurors or talesmen were not called to the book in the order in which their names appear in the list, or the order in which they may have been drawn or summoned. It has been the uniform practice of the Courts of this State, to proceed to make up and swear the panel from such jurors or talesmen, as have been found attending the Court, without waiting for or directing process against others, who may have failed to attend, and whose names may have been first drawn, or who may have been first summoned.

At the trial of the traverser on an indictment as a defaulter to the State, under the Act of 1872, ch. 329, the State offered to prove by a former clerk to the Commissioners, an entry on a ledger or book that had been kept by him as such clerk, showing the amount of



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State taxes that had been levied and placed in the hands of the traverser, as collector for 1878; and then proposed to ask the witness whether the taxes mentioned in the entry were placed in the hands of the traverser for collection, to this offer the traverser objected, and proved by the witness that he had made out and delivered to the traverser, as collector, a book containing items of the State taxes for that year, and that the delivery of the book was all that was done in the matter of placing the taxes, mentioned in the entry, in the hands of the traverser for collection; and further, that there was no special written order of the Commissioners, directing the placing of the taxes in the hands of the traverser. **HELD:**

That the objection was properly overruled, and that the evidence was admissible.

By the Act of 1872, ch. 329, relating to defaulters, the certificate of the comptroller of the State, attached to the statement of the account of a person indicted under that Act, showing the amount for which he was in default as collector of State taxes, is admissible as *prima facie* evidence in his prosecution for such defalcation; and the admissibility of such evidence does not contravene the Declaration of Rights, Art. 21, which is not to be understood as excluding all other evidence except oral evidence of witnesses produced in Court.

At the trial of the traverser on an indictment as a defaulter under the Act of 1872, ch. 329, in not paying over county taxes, in the course of empanelling the jury, a talesman was called to the book and sworn on his *voir dire*, and was asked whether he had formed or expressed an opinion, as to the guilt or innocence of the traverser; to which he replied, that he had not, that his sympathies were with the traverser, but his prejudices were against him; and he did not think himself an impartial juror. The traverser, without requesting the juror to be further interrogated, objected to his being sworn, but the objection was overruled, and the traverser then peremptorily challenged the juror. The empanelling of the jury then proceeded, and after the traverser had exhausted his twenty peremptory challenges, another talesman was called, who had been drawn in an earlier stage of the proceeding, but who did not appear to be sworn until after the traverser had exhausted his challenges. This latter talesman was sworn, against the objection of the traverser. It does not appear that the traverser offered to challenge this last juror sworn, or that he was in any manner objectionable to him as a juror, or that he would have challenged him

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if his peremptory challenges had not been exhausted. The objection made was not to the particular juror, but, as stated in the exception, to the panel as made up; and the Court below having overruled the objection, the traverser excepted. **HELD:**

That the objection was properly overruled.

**APPEALS** from the Circuit Court for Harford County,

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., ALVEY, ROBINSON and IRVING, J.

*Henry W. Archer*, for the appellant.

*Charles J. M. Gwinn*, Attorney-General, for the appellee.

ALVEY, J., delivered the opinion of the Court.

This case is brought into this Court by appeal, under the Act of 1872, ch. 316, allowing bills of exceptions and appeals to be taken in criminal cases.

The traverser was indicted as a defaulter to the State, under the Act of 1872, ch. 329. There was a demurrer to the indictment, which was overruled, and after verdict of guilty, there was a motion in arrest of judgment entered, which was also overruled; but as there has been no final judgment upon the verdict, those rulings are not brought up for review by the appeal allowed under the statute, and can only be brought here after final judgment, as provided in Rule 1, for the regulation of appeals and writs of error. 29 *Md.*, 1. There is therefore no question presented on this appeal, except such as may be found to be properly presented by bills of exception.

1. After the demurrer to the indictment had been overruled by the Court, the traverser pleaded in abatement, that the grand jury, by whom the indictment was found,

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had not been legally drawn, and was not, therefore, a lawfully constituted grand jury. The plea sets forth the particulars in which it is supposed there was a failure to conform to the directions of the statute in drawing the jury. It does not appear that the truth of the matters alleged was verified by affidavit. The plea was traversed by the State; and the issue of fact thus formed was tried before the Court instead of a jury. Evidence was offered in support of the averments of the plea, and which is set out in the first bill of exception; but, upon the trial of that particular issue, there does not appear to have been raised any question as to the admissibility of evidence, or any distinct proposition of law made, upon which the Court was required to rule. There is no statement of facts as having been found by the Court; but at the close of the evidence, as set out in the bill of exception, it is simply stated that the Court *overruled the plea in abatement*, and decided that the grand jury, drawn from the box mentioned by a particular witness, had been legally constituted, and that the traverser should plead to the indictment. It is manifest, therefore, if the ruling of the Court, as stated in this exception, is to be reviewed by this Court, it would be first necessary that we should review the evidence, and ascertain what facts are properly deducible therefrom, before we could proceed to determine the question of the correctness or incorrectness of the ruling of the Court, upon the whole evidence before it. But it is no part of the function of this Court, in a case like the present, to review evidence and find the facts that may have been the basis of the rulings of the Court below.

It was at the option of the traverser to try the issue of fact raised upon his plea either before the Court or by a jury. When an issue is joined upon a plea in abatement or replication thereto, the issue may be tried by a jury without delay (2 *Leach*, 478; *Chitty Cr. L.*, 450, 451; 1 *Whart. Cr. L.*, sec. 537; *Rex vs. Gibson*, 8 *East*, 107);

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and if the issue had been tried before a jury, clearly this Court would have nothing to do with the finding of facts. But whether it be tried before the Court or jury, unless there be a special finding of the facts, spread upon the record, either in the form of a special verdict or a special finding by the Judge, this Court, not being able or authorized to make any conclusion in regard to the question of fact, cannot, therefore, determine whether the general finding or conclusion upon the whole case, be justified or not. When the facts are found and spread upon the record, it then becomes the duty of this Court to see that the Court below has correctly applied the law to the facts thus found. As was said by the Court in the case of *Ford*, 12 Md., 547, "Whilst the Court of review cannot find the facts, yet, when the facts are found by the Court or the jury below, as the case may be, it is but its proper and legitimate province to see that the inferior Court has pronounced correctly the law as applicable to the facts." It was upon this principle that the case of *Clare*, 30 Md., 164, was decided. In that case, some of the pleas in abatement had been demurred to by the State, and others had been traversed, and all the questions raised by the pleas in abatement, as well those of fact as those of law, were tried before the Court, in whose judgment the facts were specially found and set forth, and the case was brought to this Court on writ of error, which presented the whole record for review. The facts were found by the Court below, not by this Court; and it was only because the facts were so found, that this Court was enabled to review the law that had been applied to those facts.

But, according to the statement of the bill of exception, the Court *overruled* the plea in abatement; and in this the Court was well justified, irrespective of the testimony offered, for the plea, in the manner it was pleaded, was a mere nullity. As we have already stated, the plea was without affidavit; and the Stat. 4 Ann, c. 16, sec.

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11, which has been construed to apply to criminal cases, (3 *Burr.*, 1617; 1 *Whart. Cr. L.*, sec. 536,) expressly provides, "that no dilatory plea *shall be received* in any Court of record, unless the party offering such plea do, by affidavit, prove the truth thereof," &c. This provision of the Statute of Ann is in force in this State, and must be complied with, or otherwise dilatory pleas may be rejected or treated as nullities. *Graham vs. Fahnestock*, 5 *Gill*, 215.

In 1 *Bac. Abr.*, p. 34, tit. "*Abatement O*," it is said, "if a plea in abatement is not signed by counsel the plaintiff may sign judgment, for it is *no plea at all*; and so if no affidavit be annexed, or a defective affidavit."

It has been ruled in some cases, though the reverse in others, that if a plaintiff in a civil action replies to a plea in abatement without the affidavit, he thereby waives the defect; though in a criminal proceeding the rule is different, and no such effect is produced. *Graham vs. Ingleby*, 1 *Wels., Hurl. & Gord.*, 651, 655; *Reg. vs. Bloxham*, 6 *Q. B.*, 528. The general rule, doubtless, is, that while an irregularity may be waived, a mere nullity cannot be. *Taylor vs. Phillips*, 3 *East*, 155.

2. The second exception taken by the traverser presents the question, whether the State is bound to call and present to be sworn or challenged, all jurors or talesmen that may be drawn or ordered to be summoned, in the exact order in which they are drawn, or summoned by the sheriff? or, if some, or a sufficient number, of those last on the list, have been summoned, and actually appear, whether the Court may not proceed to make up the panel from those appearing, without waiting for those named earlier on the list, or those first summoned by the sheriff, if they should fail to appear for any cause?

We can entertain no doubt in regard to this question, and think that the ruling of the Court below, as set out in this exception, was clearly correct. So far as we know,

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it has been the uniform practice of the Courts of this State, to proceed to make up and swear the panel from such jurors or talesmen as have been found attending the Court, without waiting for or directing process against others, who may have failed to attend, and whose names may have been first drawn, or who may have been first summoned. The accused has no special right in having any particular individual or individuals presented to be sworn as jurors, rather than others equally competent. All that he has a right to demand is, that the persons presented to be sworn as his triers, shall be good and lawful men, competent, under established rules of law, to be sworn in his case. The mere order of their being drawn or summoned cannot in any way affect their competency, nor can it deprive the accused of any right that he may have in the organization of the jury. Therefore, it is no ground of objection by the traverser, that the persons drawn or summoned as jurors or talesmen were not called to the book in the order in which their names appeared in the list, or the order in which they may have been drawn or summoned. The prevailing practice is founded in convenience, and often in the necessities of the case; and unless constrained by authority, we should not be willing to question or disturb that practice.

3. In the third exception it appears, that the State offered to prove by a former clerk to the County Commissioners, an entry on a ledger or book that had been kept by him as such clerk, showing the amount of State taxes that had been levied and placed in the hands of the traverser, as collector, for the year 1878; and then proposed to ask the witness whether the taxes mentioned in the entry were placed in the hands of the traverser for collection. To this offer, the traverser objected, and proved by the witness that he had made out and delivered to the traverser, as collector, a book, containing items of the State taxes for that year; and that the delivery of the book

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was all that was done in the matter of placing the taxes, mentioned in the entry, in the hands of the traverser for collection; and further, that there was no special written order of the Commissioners, directing the placing the taxes in the hands of the traverser. The objection was overruled, and the evidence admitted; and we can perceive no possible objection to the ruling thus made.

From the statement in the bill of exception, it is uncertain whether the book containing the entry was produced, or whether it was only a copy of the entry from the book. But whether offered in the one form or the other, the mode of proof was unobjectionable. If the book was produced, containing the entries, it was clearly admissible, being a book of a public nature, and pertaining to a public office; and if a copy of the entries from such book were offered, such copy was admissible upon being verified by a witness who had made the transcript, or who had compared the copy with the original entries; and this is what we must understand the State as proposing to do. 1 *Greenl. Ev.*, secs. 484, 485. And as to the fact or act of placing the taxes in the hands of the traverser for collection, it was the duty of the clerk to the commissioners, made so by statute, to place in the hands of the traverser a fair copy of the assessment of taxes, or so much thereof as it was the duty of the traverser to collect; and there is no statute that required a formal or written order by the commissioners for the delivery of the copy of the assessment to the collector. After showing the amount of the levy or assessment, either by the production of the proper book, or copy of the entries therefrom, verified by proof, it was certainly competent to prove, by parol, the fact that the copy of the assessment had been delivered to the traverser as collector. It seems to have been done by making the entries in a book, which was delivered to and accepted by the traverser. If there were any discrepancies between the entry in the book in the office

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of the County Commissioners and that made out and delivered to the traverser, he could easily have shown them by the production of his book, containing the entries of all the taxes placed in his hands for collection.

4. The fourth exception presents the question as to the admissibility and legal effect of the Comptroller's certificate, attached to the statement of the account of the traverser with the Treasury of the State, showing the amount for which the traverser was in default as collector of State taxes for the year 1878.

The Act of 1872, ch. 329, under which the traverser was indicted as a defaulter, provides that the certificate of the Comptroller of the State, or of the respective clerks of the County Commissioners, showing the accused to be a defaulter, shall, in every prosecution under the Act, be received as *prima facie* evidence of such defalcation.

It is contended by the traverser that neither the statement of the account, nor the Comptroller's certificate appended thereto, should have been received in evidence against him; that, by the Declaration of Rights of this State (Art. 21,) he was entitled to be confronted with the witnesses against him, the benefit of which he was denied by the admission of this evidence; and that it is not competent to the Legislature to make such evidence admissible in a criminal case; and, even if the Legislature could make such evidence admissible, it was incompetent to declare that such certificate should be received as *prima facie* evidence of defalcation.

If it were true that a party proceeded against by criminal accusation could be affected by no evidence except that related by a sworn witness in Court, and subject to the test of cross-examination, there would certainly be great force in the contention of the traverser. But we are aware of no principle in the law that imposes any such restriction upon criminal prosecutions. Written and documentary evidence is in daily use, in criminal as well



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as in civil trials; and if such evidence be admissible at all to contribute to the conviction of guilt, it is difficult to suggest a reason why it may not be in itself sufficient upon which to found a *prima facie* conclusion of the guilt of the party accused.

In declaring that the party accused shall have the right to be confronted with the witnesses against him, that provision of the Declaration of Rights is not to be understood as excluding all other evidence except oral evidence of witnesses produced in Court. Such has never been its interpretation, nor does the language warrant it. It is only where the prosecution is to be maintained by the testimony of living witnesses that they are required to be produced in Court, confronted with the accused, and deliver their testimony under the sanction of an oath, and be subject to cross-examination. In other words, no witness shall give his testimony in secret, or out of the presence of the accused; and no party shall be put upon his trial upon mere hearsay evidence; but the witness shall be produced, and be subject to all the tests that the law has devised for the full disclosure of the truth. In all this, however, there is nothing to exclude other evidence recognized and sanctioned by the law, as fit and appropriate means of establishing the truth of the charge against the accused.

In Article 6, of the Constitution of the United States, it is also declared that, in all criminal prosecutions, it shall be the right of the accused "to be confronted with the witnesses against him." And yet, as showing how that provision has been understood, we find that Congress, by the Act of 1846, ch. 90, sec. 16, provided that, upon the trial of any indictment against any person for embezzling public moneys, *it shall be sufficient evidence*, for the purpose of showing the balance against such person, to produce a transcript from the books of the Treasury Department, as provided by the Act of 1797, ch. 20, making

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such transcript sufficient evidence in civil actions against delinquent revenue officers, upon which to render judgment. *Rev. Sts.*, secs. 886, 887; *Hoyt vs. U. S.*, 10 *How.*, 132; *U. S. vs. Gaussen*, 19 *Wall.*, 198.

In the case of *U. S. vs. Wood*, 14 *Pet.*, 430, the party was indicted for perjury, in perpetrating a fraud upon the revenue; and the only evidence offered in proof of the falsity of the oath taken, as charged in the indictment; that is to say, the intentional suppression of the true cost of the goods imported, with intention of defrauding the government, was certain documentary evidence, consisting of entries and invoices, and certain letters. This evidence was objected to on the part of the defence, as being incompetent proof upon which to convict for the crime of perjury; and it was insisted, that the legal evidence required to convict of perjury, was the testimony of at least one living witness, to disprove the truth of the defendant's oath, as to the actual cost of the goods, at the time and place of exportation. But it was held by the Supreme Court, that it was not necessary, in order to a conviction, that the prosecution should produce a living witness to the *corpus delicti* of the defendant; that documentary evidence was all-sufficient for the purpose. It was not even contended, in that case, that the constitutional provision, that the accused was entitled to be confronted with the witnesses against him, had any application whatever. The contention was, as to the legal mode and sufficiency of proof of the specific offence. If the doctrine contended for by the traverser in this case, had been deemed tenable, it would undoubtedly have been invoked in the case of *Wood* to which we have referred.

Then, as to the effect of the certificate as evidence under the statute. As we have seen, the statute declares, that the certificate shall be received as *prima facie* evidence of defalcation. This is no novel or extraordinary provision to be found in statutes prescribing rules of evidence for the government of Courts and juries.

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In 1803, the Congress of the United States passed an Act, ch. 9, sec. 4, (*Rev. Stats., U. S., secs. 4577, 4578*), requiring all masters of vessels, owned by citizens of the United States, when bound to any port thereof, to take on board destitute seamen, at the request of consuls, vice-consuls, etc., and their refusal is made a penal offence; and the statute provides that the certificate of any such consul or other officer mentioned, under his hand and official seal, shall be *presumptive evidence* of such refusal, in any Court of law having jurisdiction to enforce the penalty. In a proceeding under this statute, to recover the penalty incurred, in the case of *Matthews vs. Offley*, 3 Sum., 115, 123, Judge STORY allowed to the certificate of a vice-consul, that the master had refused to take on board his vessel a destitute seaman, the fullest *prima facie* effect; and held that the certificate was not only *prima facie* evidence of the simple fact of *refusal*, but of all the facts stated in the enacting clause of the statute, which were necessary to bring the case within the penalty prescribed.

Indeed, there can be no question of the power of the Legislature to change the common law rules of evidence, or to prescribe new rules, altogether different from those known to the common law; and it may declare what proof shall be deemed or taken as *prima facie* sufficient to establish any particular fact, even in criminal cases. There are many illustrations and examples that could be furnished of this from our own statute book; and decided cases of high authority are abundant to sustain the competency of such legislation. In support of this proposition we may refer to the cases of *Comm. vs. Williams*, 6 Gray, 1; *Comm. vs. Rowe*, 14 Id., 47; *Holmes vs. Hunt*, 122 Mass., 505; *State vs. Henley*, 54 Me., 562; *State vs. Cunningham*, 25 Conn., 195, and *State vs. Wheeler*, Id., 290, 300. So far as this case is concerned, it may readily be conceded, that a statute that should make evidence con-

*clusive*, which was not so of its own nature and inherent force, and by that means preclude the party from showing the truth, would be simply void. But the evidence furnished by the certificate only being *prima facie* in its effect, the traverser was left at full liberty to repel and overcome that *prima facie* effect, by evidence that ought to have been within his own control.

This Court is of opinion, therefore, that there was no error in the ruling of the Circuit Court, as set forth in the fourth exception.

We have thus disposed of the several rulings in the bills of exceptions found in the record in No. 26, special docket, being the case for default in not paying over State taxes; and in what we have said in regard to the rulings in that case, in the first and fourth exceptions, equally applies to, and completely disposes of, the several rulings set out in the first and third exceptions found in the record in case No. 27, special docket, against the same party; this latter case being for default in not paying over county taxes.

The only remaining question to be decided, is that presented in the second exception in the last case mentioned.

By this exception it appears, that, in the course of empanelling the jury, a talesman named Webster, was called to the book and sworn on his *voir dire*, and was asked whether he had formed or expressed an opinion, as to the guilt or innocence of the traverser; to which he replied, that he had not; that his sympathies were with the traverser, but his prejudices were against him; and he did not think himself an impartial juror. The traverser, without requesting the juror to be further interrogated, objected to his being sworn, but the objection was overruled, and the traverser then peremptorily challenged the juror. The empanelling of the jury then proceeded, and after the traverser had exhausted his twenty peremptory challenges, another talesman was called, who had been drawn in an earlier stage of the proceeding, but who did

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not appear to be sworn until after the traverser had exhausted his challenges. This latter talesman was sworn, against the objection of the traverser. It does not appear that the traverser offered to challenge this last juror sworn, or that he was in any manner objectionable to him as a juror, or that he would have challenged him if his peremptory challenges had not been exhausted. The objection made was not to the particular juror, but, in the language of the exception, to the panel as made up; and the Court having overruled the objection, the traverser excepted.

There is nothing presented by this exception that would justify this Court in reversing the ruling of the Court below. In the first place, we are not prepared to say, that the talesman, Webster, was an incompetent juror. He had neither formed nor expressed any opinion in regard to the case; and his feelings towards the traverser would seem to have been balanced. It is true, he thought himself not an impartial juror, but that matter should have been more thoroughly probed, in view of what he had previously said in regard to the state of his mind. The party, however, was summarily discharged by the use of the peremptory challenge by the traverser, and no exception was then taken to the ruling of the Court. It was when the last juror was called to be sworn that an objection was raised to the completion of the panel, and after that juror was sworn, the objection was renewed to the panel as then completed; and to the overruling of that objection the exception was taken. It was not suggested that the traverser was in any manner prejudiced by the swearing of the last juror called. He neither offered to challenge that juror peremptorily nor for cause; and, as we have seen, the objection upon which the exception was taken, did not go to the individual juror, but to the entire panel as it was then constituted.

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We think the objection was properly overruled; and as we find nothing in any of the exceptions taken in either case, to constitute cause of reversal, we must affirm those rulings, and remand the cases to the Court below for judgments upon the verdicts rendered.

*Rulings affirmed, and  
cases remanded.*

(Decided 27th January, 1881.)

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JOHNS HOPKINS UNIVERSITY, CLAUDE BAXLEY and  
ISAAC R. BAXLEY vs. THEODORA PINCKNEY.

*Construction of a Will and Codicil.*

The will of B. dated in May, 1873, contained the following: 1st. A provision for the preservation and protection of the testator's lot in a cemetery. 2nd. A provision directing the manner in which his grave should be marked, and limiting the privilege of interment in his burial lot. 3rd. A provision for the payment to his brother, of a proportion of the expenses which his brother had incurred in removing the remains of members of the testator's family to a burial lot; and also for a legacy of \$1000 to the brother. The fourth provision was as follows: "I direct that the sum of \$10,000 shall be set aside and invested by my executors hereinafter named, in a safe security, and the income thereof annually to be paid to T. P., for and during her life, if she shall be and remain unmarried: at her death, or upon her marriage, the principal sum above named to become and be a part of the residue of my estate, and to be disposed of as hereinafter provided for." Then follows a statement of his reasons for making this bequest. 5th. A provision disposing of the rest and residue of his property in favor of his son C., if he should be alive at the death of the testator; and in the event of the death of C., making other dispositions of said rest and residue. Finally, he appointed his executors. In February, 1876, he executed the following codicil to his will:

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"First. I revoke all devises and bequests given by me to my son C., therein, absolutely, and in lieu thereof, I devise to him all my real estate for life; after his death, then to go to the Trustees of the Johns Hopkins University, for them therewith to endow any medical professorship therein, they may think proper. Secondly. I bequeath to my brother, in lieu of the \$1000 in said will given, the sum of \$5000 for life; after his death, to go to said trustees of said University for said purpose. Thirdly. I bequeath the \$15,000 in bonds in my box in bank, and the money on deposit in the banking house of J. S. G. & Co., and any other personalty of which I am possessed, to the said trustees of said University for said purpose, hereby republishing said will in every other respect." In a proceeding in equity, it was HELD:

That B. meant to revoke and alter the third and fifth clauses of his will only, and by the last clause in the codicil, to give the rest of his personalty, not disposed of by the preceding clauses, to the University; subject, however, to the two provisions of his will in regard to his burial lot, and subject to the legacy of \$10,000 in favor of T. P.

#### APPEAL from the Circuit Court of Baltimore City.

This was a proceeding in equity, on the part of the appellee, to obtain a construction of the will, and codicil thereto, of Dr. H. Willis Baxley, late of the City of Baltimore, who died in that city on the 13th of March, 1876, having executed the testamentary papers in controversy. The bill prayed, that the executor of the estate might be authorized and required by the Court, to invest ten thousand dollars in some safe security, and to pay the income thereof annually to Miss Pinckney, who claimed to be entitled to receive it as legatee, as long as she might live and remain unmarried. The appellants, Claude and Isaac R. Baxley, were the only children of the testator, who survived him.

By the will the testator directs:

First. That the sum of one thousand dollars shall be paid over to the Trustees of Greenmount Cemetery, in

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the City of Baltimore, to be by them invested in a safe ground-rent security of said city, and the annual income thereof to be by them expended in the protection from intrusion of his cemetery lot, and for the painting, and keeping therein of suitable shrubbery and ivy.

Second. That a rough hewn granite rock of large size, with an inscription thereon, to wit, "H. Willis Baxley and Annabella Baxley, and their children," shall be prepared at the cost of his estate, and put upon the slab at present covering his tomb, and upon such other basis as may be necessary for its support; and that said rock shall have trained over it, thickly, and always, the ivy green; and that after the burial in said tomb of his son Claude, if he should so select to be with his father and mother, his Greenmount Cemetery lot shall be forever after closed to further interments.

Third. That his executors pay to his brother, J. Brown Baxley, the testator's proportion of whatever costs were incurred by the brother for the removal of the remains of his father and mother, and their children, from Clover Hill Cemetery, and their interment in his Greenmount lot; and that the sum of one thousand dollars shall be paid to his brother, J. Brown Baxley, if alive at his death, in token of his recognition of his kindly interest in his son Claude's welfare. If his brother shall not be alive when this will takes effect, then this legacy to become null and void.

Fourth. He directs that the sum of ten thousand dollars shall be set aside and invested by his executors, hereinafter named, in a safe security, and the income thereof annually to be paid to Theodora Pinckney, (niece of Judge Marion, of Skaneateles, New York,) for and during her life, if she shall be and remain unmarried: at her death, or upon her marriage, the principal sum above named to become and be a part of the residue of his estate, and to be disposed of as hereinafter provided for; and that his object



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in giving this legacy is to show his grateful sense of the Christian sympathy in his sufferings of one met in Rome several years since, and to testify to the influence for good of her inculcation and practice of the precepts of divine truth, in strengthening his efforts to "seek the Kingdom of God and His righteousness."

Fifth. He devises and bequeaths all the rest and residue of his real and personal property of every name and nature, and wheresoever situated, to his son, Claude, if he shall be alive at the time this his will shall take effect; but if he shall be dead at that time, then, and in that case only, he devises to George H. Williams, attorney at law, and to his brother, J. Brown Baxley, both of Baltimore, and to the survivor of them, and thereafter to such trustees as may by them, or the survivor of them, be named, all the rest and residue of his real and personal property, comprehended by the beginning of this fifth clause, in trust and confidence, nevertheless, for the following uses and purposes, to wit: the income thereof to be expended in the support and education of the children, or child, if but one, of his son Claude; and on their attainment to lawful age, the principal to be equally divided among them, if more than one, otherwise to be paid to the survivor of them; and if none survive, then, after increasing his bequest to the Trustees of Greenmount Cemetery, to the amount of one more thousand dollars, for the protection and preservation of his cemetery lot, the above named trustees shall do with the rest and residue of the principal as to them shall seem right to my memory. In this part of the paper the testator enters into particular reasons for the disposition made by him of his property, in this clause of his will.

Finally he appoints his son, Claude Baxley, and George H. Williams, attorney at law, his executors.

The codicil to this will is fully set forth in the Court's opinion, wherein the case is further stated.

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The cause was argued before BOWIE, GRASON, ALVEY, ROBINSON and IRVING, J.

*Charles J. M. Gwinn*, for the appellant, Johns Hopkins University.

The question in the case, is whether the bequest made to Theodora Pinckney, by the testamentary writing, dated May 17th, 1873, was revoked or annulled by the codicil of February 26th, 1876. "The mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one, unless the latter expressly, or in effect, revoke the former, or the two be incapable of standing together." "Though it be a maxim that no man can die with two testaments, yet any number of instruments, whatever be their relative date, or in whatever form they may be, so as they be all clearly testamentary, may be admitted to probate as together containing the last will of the deceased." "If a subsequent testamentary paper be partly inconsistent with one of earlier date, then such latter instrument will revoke the former as to those parts only where they are inconsistent." *Williams on Executors*, (4th Am. Ed.,) part 1, book 2, ch. 3, sec. 2, p. 132; *Lemage vs. Goodban*, 1 L. R. Prob. and Div., 61; *Green vs. Triber*, 9 L. R. Chan. Div., 1878, p. 234.

From the principles thus stated, the conclusion is plain, that a "will and codicil are to be construed together as one instrument, and are to be reconciled as far as practicable; but if there be any conflict or repugnancy between them, the codicil, as the last indication of the testator's mind, must operate in preference to the will." *Lee vs. Pindle and Wife*, 12 G. & J., 305; 1 *Jarman on Wills*, (2nd Am. Ed.,) 156, 158; 1 *Wms. Ex'rs*, (4th Am. Ed.,) margin page 133; *Baker vs. Story*, 23 *Weekly Reporter*, 147, (1875;) *Kermode vs. McDonald*, 3 L. R. Ch. App., 586, 587; *Bryan vs. White*, 14 *Jurist*, 919; *Sheddon vs.*

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*Goodrich*, 8 *Sumn. Ves.*, 499, Lord ELDON; *Holder vs. Howell*, 8 *Sumn. Ves. Jr.*, 102, Sir WM. GRANT; *Parker vs. Nickson*, 9 *Jurist, N. S.*, 451; *Earl of Hardwicke vs. Douglass*, 7 *Cl. & F.*, 795; *In re Daniel Low*, 3 *Swab. & Trist*, 478; *Bosley vs. Bosley*, 14 *Howard*, 395, TANEY, C. J.; *Barlow vs. Coffin*, 24 *Howard's Pr. Rep.*, 54; *Larrabee vs. Larrabee*, 28 *Verm.*, 274.

There would seem to be no reason for abstaining from giving full effect, in every case, to the controlling power of a codicil, if there be any conflict or repugnancy between the codicil and the will. When the question is concerning a will only, it is an established rule "that where two clauses or gifts are irreconcilable, so that they cannot possibly stand together, the clause or gift which is posterior in local position shall prevail; the subsequent words being considered to denote a subsequent intention." 1 *Jarman on Wills*, 2 *Am. Ed.*, 394; *Iglehart vs. Kirwan*, 10 *Md.*, 564; *Pue vs. Pue*, 1 *Md. Ch. Dec.*, 385. If a subsequent clause in a will, which is inconsistent with, or repugnant to, a prior clause, prevails over such prior clause, it would seem that the same effect ought, with greater reason, to be accorded to a *codicil* inconsistent with, or repugnant to, any clause in a prior will, since such codicil is evidence of a testamentary intention manifested at a later period of time.

It would seem to be settled law, moreover, in this State, that where there is a general and particular intent, apparent upon the face of a will, "the general intent, although first expressed, shall control and overrule the particular intent." *Chase vs. Lockerman*, 11 *G. & J.*, 206; *Jones vs. Earle*, 1 *Gill*, 401, 402; *Thompson vs. Young*, 25 *Md.*, 458; *Taylor vs. Watson*, 35 *Md.*, 524. It follows, certainly, that in a case where the general intent was not only expressed subsequent to the particular intent, but was expressed at a subsequent period of time, in a codicil, in which the testator radically changed his

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prior testamentary dispositions, the general intent, as expressed in the codicil, ought, under the decisions in this State, to be construed as controlling and overruling the particular intent expressed in the prior will.

No inference, contrary to the application of this rule, can be deduced from the fact that the codicil, containing the expression of this general intent, republishes the will in every respect in which it does not alter it. Such words of republication were superfluous. The codicil had, of itself, the effect to republish the will, as of the date of the codicil, in respect to all parts of the will, which were not revoked by the codicil in express terms, or by a devise so entirely inconsistent with the terms of the will as to make it impossible to give effect to both. *Jones vs. Earle*, 1 *Gill*, 400; *Bartholomew's Appeal*, 75 *Penn. State*, 169; 1 *Wms. on Ex'rs*, (4th Am. Ed.) margin p. 179.

It is true that the most liberal and enlarged interpretation will be given to testamentary instruments, in order to effectuate the manifest design of the testator, "if there be apt words to effectuate it." *Chew vs. Chew*, 1 *Md.*, 168, 169. But this Court has said, adopting the words of Lord KENYON in *Lane vs. Lord Stanhope*, 6 *Term Rep.*, 352, "it is our duty, in construing a will, to give effect to the *devisor's* intention, as far as we can consistently with the rules of law, not conjecturing, but expounding his will *from the words used*." We must take the terms and words he uses, and gather his intentions from *them*. *Taylor vs. Taylor*, 47 *Md.*, 299.

The bequest to Theodora Pinckney, contained in the testamentary paper, dated May 17th, 1873, with the provision as to the disposition of the fund upon her death or marriage, was not the gift of a general legacy to be drawn from a specific fund. It was, therefore, not a demonstrative legacy. 2 *Redfield on Wills*, Ed. 1866, pp. 462, 463, 467; *Mullins vs. Smith*, 1 *Drew & Sm.*, 204; *O'Hara on Const. of Wills*, 330. It was, on the contrary, a general pecuni-

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ary legacy. *Simmons vs. Valance*, 4 *Brown Chanc. Rep., Am. Ed.*, 251, 254; *O'Hara on Const. of Wills*, 336; *Hawkins on Wills, Am. Ed.*, 300, 301.

The repugnancy between the testamentary paper and the codicil in relation to the matter now in controversy, is evident. The testator made by the codicil, an absolute disposition of his entire estate and property, leaving, in fact, no part of the original testamentary paper operative, except the clause which appointed his executors. He revoked all his will, saving this portion only. *Kermode vs. McDonald*, 3 *L. R. Chanc. App.*, 586, 587; *Bosley vs. Bosley*, 14 *Howard*, 395; *Larrabee vs. Larrabee*, 28 *Verm.*, 274.

The particular provisions made in the first part of the codicil, and the bequest to the Johns Hopkins University, in the last paragraph of that codicil, of the bonds of the testator in his box in bank; of the money on deposit with J. S. Gittings & Co., and of any other personalty of which he was possessed, prove plainly that the provision made for the Johns Hopkins University was not made by implication, but was, on the contrary, a plain, unqualified and absolute disposition in favor of that University of the reversion of his real estate, and of all his personal estate, except that given to his brother, J. Brown Baxley. The absolute disposition thus made would seem "to be expressed with such clearness as to operate as a revocation of the plain and specific" bequest to the appellee. There do not appear in this case any of the particular circumstances which influenced the judgment of TINDAL, C. J., in *Herle vs. Hicks*, 1 *Cl. & F.*, 24-33. The case under discussion is more analogous to *Earl of Hardwicke vs. Douglas*, 7 *Cl. & F.*, 808-812, Lord BROUGHAM. The true rule to govern us in the consideration of this case is stated by Lord COTTENHAM in his dissenting opinion in the case last cited: "If the words do not bear it, it is contrary to all rule to speculate upon the intention; for the

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ground of conclusion ought not to be found in anything but the expressions which are used." 7 Cl. & F., 813, 814.

The last clause in the codicil shows a *general intent, last expressed, in a separate and final testamentary paper*, which, under the authority of the Maryland and other cases, already cited, controls the *particular intent* manifested in the will in favor of the appellee. *The final purpose of the testator must be gathered from his latest words.* 47 Md., 299.

*F. H. Hack* and *Charles Marshall*, for the appellants, *Claude and Isaac R. Baxley.*

The changes made in the disposition of the testator's estate by the codicil, all operating against those who would have taken under the will, demonstrate a total alteration in the testator's mind and show a marked general intention on his part to make a new and different distribution; and that it was his intention that the legacy prompted by an alleged Christian sentiment, should yield to the Christian purpose of aiding the advancement of medical science. It is an elementary principle of law, that in the interpretation of ambiguous and obscure wills, effect should be given to the main and leading purpose evident in the testator's mind.

Where there is a particular intent expressed in a will, and a general intent, inconsistent therewith, the latter must prevail. *Jones vs. Earle*, 1 Gill, 400; *Simper's Lessee vs. Simpers*, 15 Md., 160; *Lee vs. Pindle*, 12 G. & J., 288; *Chase vs. Lockerman*, 11 G. & J., 185.

The appellee was a stranger to the testator. His return to his former associations freed him from a passing influence to which he had doubtless attached too much importance. There is no intimation of any change in his affection for his son Claude, or Claude's children. Is it not, then, a most reasonable presumption, that the new motive which prompted the codicil would have acted with as much effect against the appellee, as it evidently did against them?

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There were three distinct matters dealt with by the will: 1st, the testator's property; 2nd, his alleged personal grievances: 3rd, the appointment of executors. It will be seen that the first and second clauses, and the first part of the third clause, of the codicil, deal exclusively with the first matter referred to, the property. Clearly, then, the confirmatory clause relied on by the appellee had reference solely to the other two matters comprehended by the words "every other respect;" namely, the alleged grievances, and the appointment of executors. Taking the whole sentence, it cannot be conceived, we respectfully submit, to what the words "every other respect" can possibly refer, unless "respect" other than the property just disposed of. The testator could not have intended to refer to a part of the will which embraced a disposition of any part of his estate, for he had just used words which gave it to the University absolutely, with the exception of a small portion excepted by the codicil itself. And this gift, as to all personalty he knew of, was "specific," *i. e.* "his bonds and money." The appellee would place him in the position of confirming her legacy, and in the same sentence depriving the executors of the power of satisfying it. Without commenting on that portion of the will which deals with the alleged grievances, we desire to call the Court's attention to the fact that it formed in the mind of the testator the most important part of his will, for he speaks of his property as "the little I shall leave of worldly goods." Remembering this, it is only too plain what he meant, when he confirmed his will in "every other respect" than the disposition of property, made *eodem tempore*.

In the view of the appellee, if the general bequest in the third clause of the codicil revokes her legacy given in the will, it must also revoke the legacy given the testator's brother in the second clause of the codicil. Remembering that a codicil is made for the purpose of revoking,

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altering, or adding to a will, we do not conceive that a legacy, expressly given in the codicil in lieu of one given in the will (and in this case qualified by a remainder over in favor of the residuary legatee,) can stand upon the same footing as a legacy not mentioned in the codicil at all. The fact that the legacy to the testator's brother is thus excepted in the codicil, is strong evidence that he intended to except him only, of all the other legatees mentioned in the will who would have taken part of his personalty. It is also to be remembered that the codicil alone (not the codicil and the will together,) is to be taken as the last indication of the testator's intention; and if there be repugnancy between it and the will, it must operate in preference to the will. *Lee vs. Pindle*, 12 G. & J., 288.

The codicil revoked all legacies given by the will. Strong evidence of this is the fact that the codicil makes special exception in favor of Claude and J. Brown Baxley.

The fact that a legacy mentioned in a will is not specially excepted from the operation of a codicil which pretends to deal with the testator's whole estate, is strong evidence that the testator intended to revoke such legacy. *Larabee vs. Larabee*, 28 Vermont, 274.

In the above case, certain furniture was bequeathed to the testator's daughters by will. He afterwards made a codicil in which, after making certain bequests, he left all his real and personal estate to his son, not mentioning the former legacy to the daughters. In their opinion the Court say: "There is no express revocation of the gift of the legacy, yet if there was a subsequent gift of it inconsistent with the former, it will be a revocation. The legacy will pass under the *general language* of the bequest, for it is a gift of all his real and personal estate which shall remain, not that which remains undisposed of under the original will. If the testator had intended that the



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legacy bequeathed by the will should pass *by it*, and not be affected by the codicil, he would have excepted it. The fact that it is not excepted is evidence that he intended it should pass under the codicil: "*i. e.* be revoked." In the case of *Holden vs. Howell*, 8 *Vesey*, 96, it was decided that where a codicil is made for a particular purpose, and pretends to deal with and dispose of the whole estate the same as the will, but omits one of the trusts of the will, at the same time declaring that the testator does "confirm my said will in every particular thereof that is not hereby altered or revoked," such codicil revokes the omitted legacy. See also, *Kemode vs. McDonald*, 3 *L. R. Appeals*, 586, 587; *Bosley vs. Bosley*, 14 *Howard*, 395.

*John H. Thomas*, for the appellee.

The principles of law governing cases like the present one, are stated, in *Williams on Ex'rs*, part 1, book 2, chap. 3, sec. 2, p. 162; 22 *Weekly Reporter*, 353; *Flood, Wills of Pers. Prop.* (1877,) pp. 331-2-3, 355; 4 *Kent's Com.*, 531-2; 1 *Redfield on Wills*, 352, sec. 14; *Iglehart vs. Kirwan*, 10 *Md.*, 559, 564; *Pue vs. Pue*, 1 *Md. Ch. Dec.*, 385; 2 *Am. Lead. Cases*, 506; *Holden vs. Blaney*, 119 *Mass.*, 421; *Kerr vs. Baroness Clinton*, 8 *Equity (Law R.)*, 464; *Robertson vs. Powell*, 2 *Hurlston & Coltman, (Exch.)*, 752; *Acc. Doe, d. Hearle vs. Hicks*, 1 *Clark & Fin.*, 20; *Roscoe's Dig. of Evid. at N. P.*, p. 934; *Quincy vs. Rogers*, 9 *Cushing*, 291; and see *Williams vs. Evans*, 1 *Ellis & Blackb.*, 727, (72 *E. C. L. Rep.*, 740); *Pillsworth vs. Morse*, 14 *Irish Chan. Rep.*, 163, 176-180; *Jones vs. Earle, Ex'r*, 1 *Gill*, 395, 400; *Pue vs. Pue*, 1 *Md. Ch. Dec.*, 385; *Lee vs. Pindle*, 12 *Gill & J.*, 288, 305; *Douglas vs. Blackford*, 7 *Md.*, 8; *Taylor vs. Watson*, 35 *Md.*, 519; *Chew vs. Chew*, 1 *Md.*, 163-169; *Young vs. Twigg*, 27 *Md.*, 625; *Cornish vs. Willson*, 6 *Gill*, 320.

The rules laid down in the books are plain and peremptory, and it only remains to apply the tests which they prescribe.

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The bequest to Miss Pinckney is clear. The desire that she should enjoy it is conspicuous, and the impulse which prompted the testator to bestow it is expressed with unusual earnestness and force. Is it "equally clear and free from doubt" that he intended to revoke it? If not, there is no revocation. *Robertson vs. Powell*, 2 *Hurlston & Coltman*, (*Exch.*) 752.

There are no "surrounding circumstances" (see *Taylor vs. Watson*, 35 *Md.*, 519) indicating any such intention. There is no intimation of any change in his regard for Miss Pinckney, or in the grateful feelings towards her which the bequest discloses. No new object of personal sympathy had presented itself to him. The determination to endow the Johns Hopkins University was the only fresh purpose that had entered his mind. But it was not an exclusive purpose, and whenever he intended it to supersede the purposes declared by his will, he said so, in terms, leaving nothing to implication. The bequest to Miss Pinckney he did not revoke or allude to. On the contrary, after modifying, as above, the provisions of the will in favor of his son and his brother, and making the general disposition of personalty contained in the third clause of the codicil, he expressly republished his will "*in every other respect.*" If the contention of the respondents is maintainable, there was no "respect" in which this republication could have any effect, except the appointment of executors. The codicil, in that aspect, was a new will, except as to the executors. But such a construction is absolutely incompatible with the words used. Neither he nor the draughtsman of the codicil could possibly have meant to indicate a single "respect," by the words "every other respect," which, in themselves, necessarily involve the suggestion of more than one. Besides, as the codicil neither expressly nor by implication revoked or could have been imagined to revoke the appointment of executors made by the will, republication in that regard was too

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plainly needless to have been thought of. Any one, to whom it could have appeared necessary, would have made it in express and exclusive words. Nor is it believed to be within the range of reasonable supposition, that the testator, in his zeal for the endowment of the University, intended to revoke the provisions of the will for the protection and adornment of his own burial place and that of his family, or the repayment to his brother of moneys expended, on his behalf, in honoring the remains of their parents. These provisions, and the bequest to Miss Pinckney, appear to have been alike near to his heart, and when he republished his will "in every other respect," all of these were "respects" which he must have had alike in contemplation. The bequest to Miss Pinckney in particular, it must be borne in mind, too, was already for life only, *dum sola*. At her death the \$10,000 in dispute must pass to the University, in every event, just as the devise to the son and the bequest to the brother, for life, under the codicil. That Miss Pinckney, like them, should enjoy her legacy for her single life, was as reconcilable as the provisions in their favor, with the contemplated benevolence of the testator to the University, which has perpetual life. When, therefore, after the changes in the codicil, as to the brother and the son, and the general devise of personalty to the University, the testator still recurred to the will and republished it, it is not only consistent with his purpose of University endowment that he intended the bequest to Miss Pinckney to remain as the will had given it, but that he meant to re-assert the first purpose and make the second subordinate to it. The testator merely meant to withdraw from his son and give to the University the remainder in the legacy, after Miss Pinckney's death, precisely as he withdrew from his son and gave to the University all but a life estate in the realty. Taking the will and the codicil "as one instrument;" remembering that they "are to be reconciled as

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far as practicable ;” that it is “the natural presumption” that both dispositions were intended to stand ; that revocation is not to be implied “further than is absolutely necessary,” and only “to the smallest extent that will serve to reconcile the two instruments ;” that a devise in a codicil, to work revocation, must be one which “cannot possibly be reconciled with the will,”—one indeed, so far irreconcilable with it, that “the two papers cannot possibly exist conjointly, so as to form one will,” and it is “impossible to give effect to both” of the clauses supposed to conflict—in other words, that the two clauses are incapable of standing together under “the most enlarged and liberal interpretation”—it is difficult, to see upon what authority the absolute, implied revocation insisted on can be maintained. “The presumption is in favor of the continuance of the intention which has been formally expressed,” and, that intention being clear, “it is incumbent on those who contend that it is not to take effect, by reason of a revocation in the codicil, to show that the intention to revoke is equally clear and free from doubt with the original intention to devise.” An intention to revoke, clear and free from doubt, is not only not to be found, but is not even indicated, in this case. The continuance of the original intention is thus a conclusive presumption of law, and when the testator, in the codicil, used the words “any *other* personalty,” he must be taken to have meant any personalty “other” than that bequeathed to Miss Pinckney by the will, as well as “other” than that given to his brother by the codicil.

ROBINSON, J., delivered the opinion of the Court.

By the fourth clause of his will, the testator directed his executors to invest the sum of ten thousand dollars in some safe security, and to pay the income thereof annually to Theodora Pinckney, so long as she remained unmarried. “My object,” says the testator, “in giving this

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legacy, is to show my grateful sense of the Christian sympathy in my sufferings, of one met in Rome several years since, and to testify to the influence for good of her inculcation and practice of the precepts of divine truth, in strengthening my efforts to seek the kingdom of God and his righteousness."

The will was executed at Madrid, in Spain, on the 17th of May, 1873.

After his return to this country, the testator on the 26th of February, 1876, made the following codicil:

"First. I revoke all devises and bequests given by me to my son, Claude Baxley, therein, absolutely, and in lieu thereof, I devise to him all my real estate for life; after his death, then to go to the trustees of the Johns Hopkins University, for them therewith to endow any medical professorship therein, they may think proper.

"Secondly. I bequeath to my brother, J. Brown Baxley, in lieu of the \$1000 in said will given, the sum of \$5000 for life; after his death, to go to said trustees of said University for said purpose.

"Thirdly. I bequeath the \$15,000 in bonds in my box in bank and the money on deposit in the banking house of J. S. Gittings & Co., and any other personalty of which I am possessed, to the said trustees of said University for said purpose, hereby republishing said will in every other respect."

The question in this appeal, is whether the codicil revokes the legacy of \$10,000 to Miss Pinckney, in the fourth clause of the will?

In determining the question of revocation of a will by a codicil, all the cases agree:

1st. That the codicil does not operate as a revocation of a devise or bequest in a will, unless there is an express clause of revocation, or unless the provisions in the codicil, are so inconsistent with the will, that the two cannot stand together.

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2nd. If revocation is to be implied from inconsistent provisions, it will be limited to such provisions of the will, as are plainly inconsistent with the codicil.

3rd. Where the devise or bequest in the will, is clear and free from doubt, the intention to revoke by the codicil, must be equally clear and explicit. *Jones vs. Earle, Ex'r*, 1 Gill, 395; *Lee vs. Pindle*, 12 G. & J., 305; *Douglas vs. Blackford*, 7 Md., 8; *Doe vs. Hicks*, 8 Bing., 475; 1 Cl. & Fin., 20; *Alexander vs. Alexander*, 6 De G., M. & G., 593; *Agnew vs. Pope*, 1 De G. & J., 49; *Patch vs. Graves*, 3 Drew, 348; *Williams' Ex'rs*, (6th Am. Ed., 220;) 4 Kent, 531.

The governing principle which lies at the bottom of these well settled rules, is the intention of the testator, to be ascertained from the face of the will and codicil, construed as one instrument. Apart from these general rules, where the question is one of intention, judicial decisions in other cases, afford but little assistance in the construction of testamentary papers, because it rarely happens, that two wills are expressed precisely in the same language.

Tested by these general principles, the question here is whether the gift to Miss Pinckney is revoked by the codicil.

So far as the will is concerned, there is no doubt of the testator's intention to give to her the interest on \$10,000 during her single life. This is declared in plain and explicit terms, and the impulse which prompted the bestowal of it, is expressed with unusual earnestness and force. It will not be contended there is any clause in the codicil expressly revoking this gift.

The testator does revoke in *express terms* the *devises and bequests to his son Claude*, and in lieu thereof, he gives to him a life estate in the realty, with remainder to the trustees of the University.

He also *modifies the provision in favor of his brother, J. Brown Baxley*, and in lieu of the \$1000, gives him \$5000

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for life, and after his death the \$5000 to the University.

There is no reference whatever to the legacy to Miss Pinckney, and if it be revoked at all, it must be by the operation of the last clause in the codicil, in which he gives the \$5000 in bonds, and his money on deposit, and such other personalty of which he was possessed at the time of his death to the University. Standing alone, this clause might be construed as a bequest of all other personal property belonging to the testator, not otherwise disposed of by the preceding clauses in the codicil. In the same clause, however, we find the testator ratifies and confirms his will in every other respect. By this, we understand him to ratify all the provisions of his will which are not inconsistent with the codicil. In order to ascertain the testamentary intention of the testator, it is necessary, therefore, to examine the provisions of the two papers, and see in what respects they are inconsistent with each other.

By the first clause of the will, the testator directs the sum of one thousand dollars to be paid to the trustees of Greenmount Cemetery, the income thereof to be expended in the preservation of his cemetery lot.

By the second, he provides that a "rough-hewn granite rock of large size," with an inscription to "H. Willis Baxley and Annabella Baxley, and their children," shall be prepared at the cost of his estate, and placed in said lot, and after the burial in said tomb of his son Claude, should he so select, he directs that his cemetery lot "shall be forever after closed to further interments."

There is no clause expressly revoking, nor is there a reference of any kind in the codicil to these provisions; and when they are read in connection with other parts of the will, in which the testator refers to the unhappy relations between himself and those who ought to have been nearest to him in life, it is unnatural and unreasonable to suppose he intended to revoke these provisions, and give the money thereby to be expended, towards the endow-

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ment of a School of Medicine. And yet such is the appellants' contention.

And when we come to the fourth clause, in which the testator directs his executors to invest the sum of ten thousand dollars, the income thereof to be paid to Miss Pinckney so long as she remains unmarried, and in which he expresses the motives which prompted this bestowal of his bounty, his deep sense of gratitude for the sympathy manifested by her, in all his troubles and sufferings, it is equally improbable that he meant to revoke this gift, and confer it upon the University. We do find that he expressly revokes or modifies the provisions of his will, in regard to his son Claude and his brother; and if he intended to revoke the bequest in favor of Miss Pinckney, it is but reasonable to suppose that he would have done so in terms equally plain and explicit. Where a bequest is thus made in clear and unambiguous terms, it would be against every sound principle of construction, to permit such a gift to be revoked by doubtful expressions in a codicil. As a general rule it is said, that in order to revoke a clear devise, the intention to revoke, must be as clear as the devise. *Williams' Ex'rs*, (6th Am. Ed.,) 220; *Bosley vs. Bosley*, 14 How., 395; *Quincy vs. Rogers*, 9 Cush., 295; *Lee vs. Pindle*, 12 G. & J., 288.

Construing, then the will and codicil together, it seems to us that the testator meant to revoke and alter the third and fifth clauses of his will, only, and by the last clause in the codicil, to give the rest of his personal property, not disposed of by the preceding clauses, to the trustees of the University, *subject, however, to the provisions of his will in regard to the protection and adornment of his burial lot, and subject to the legacy of \$10,000, in favor of Miss Pinckney.*

This construction is consistent with the *general intent* in the codicil to endow a professorship in the University, and consistent, too, with the *particular intent* expressed in the



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will, to bestow his bounty in part upon one, whom he declares to be pre-eminent y entitled to his gratitude. And in ratifying his will in all other respects, he meant to ratify all such provisions of the will, as were not plainly revoked or altered by the codicil. It was not his purpose, as the appellants contend, to make an absolute disposition of his entire property by the codicil, thus leaving no part of the original testamentary paper operative, except the clause appointing the executors. This would be to give to the codicil the effect and operation of a new will, out and out, and not as the testator meant it to be, merely an addition or supplement to his original will. If he intended to ratify only so much of the will as appointed the executors, then such ratification was altogether unmeaning and unnecessary, because the codicil made no change or alteration whatever in this respect.

Being of opinion, then, that the gift to Miss Pinckney is neither expressly or impliedly revoked by the codicil, the decree will be affirmed.

*Decree affirmed.*

(Decided 27th January, 1881.)

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FRANCIS N. BURGOON vs. ELIAS BIXLER.

*Evidence in an Action on a Joint and Several Note—Statute of Limitations.*

In an action on a joint and several promissory note against one of two makers, to which he pleaded payment and limitations, evidence was admissible of payment of items of interest and of part of the principal by the co-maker, who was dead when the suit was brought, endorsed on the note in his hand-writing, and of admissions by the maker sued, to take the note out of the operation of the Statute of Limitations, and show that it was the latter's debt.

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APPEAL from the Circuit Court for Carroll County.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., BOWIE, MILLER, ALVEY and IRVING, J.

*D. N. Henning* and *W. P. Maulsby*, for the appellant.

*C. B. Roberts*, for the appellee.

BARTOL, C. J., delivered the opinion of the Court.

This suit was brought by the appellee upon the joint and several promissory note made by the appellant and Josephus H. Hoppe, since deceased, dated April 18th, 1870, whereby they promised to pay to the appellee, ten months after date, \$900, with interest from date, for value received. The suit was brought on the 29th day of October 1878.

The defendant pleaded:

1st. That he never promised as alleged.

2nd. Payment; and

3rd. The Statute of Limitations.

Issue was joined on the first and second pleas. To the *third* plea, the plaintiff filed seven replications. To the third, fourth, fifth and sixth of these, the defendant demurred and the demurrers were sustained; no question therein arises upon this appeal.

Issue was joined on the first, second and seventh replications.

The *first* relies upon an alleged payment by the defendant on account of interest on the note, within three years before the suit, to take the case out of the Statute.

The *second* relies upon an alleged payment by the defendant on account of the principal due on the note, made within three years before the suit.

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The *seventh* alleges a new promise by the defendant within three years before the suit.

The verdict and judgment being in favor of the plaintiff, the defendant appealed. In the course of the trial below *four* bills of exceptions were taken by the appellant, which will be disposed of in their order.

*First Exception.*—The plaintiff gave in evidence the promissory note, with the endorsements thereon, (the note has before been described) and proved that the signatures thereto were in the proper hand-writing of Josephus H. Hoppe, since dead, and of defendant, and further proved that all the endorsements on the back of the note were made by, and were in the hand-writing of said Hoppe.

The endorsements were as follows:

"March 30th, 1871. Received on the within note \$54.00.

"April 4th, 1872. Received on this within note for one year \$54.00.

"April 14th, 1873. Received interest on this within note for one year \$54.00.

"April 1st, 1874. Rec. as interest on the within note \$54.00.

"April 1st, 1875. Received interest on this within note for one year \$54.00.

"April 1st, 1876. Received interest on this within note for one year \$54.00.

"March, 1877. Received interest on the within note \$42.00.

"April 1st, 1876. Received on this within note two hundred dollars."

The plaintiff then offered in evidence the following check, viz:

"\$900.00. Westminster, April 18th, 1870.

"First National Bank of Westminster will pay to Francis N. Burgoon the sum of nine hundred dollars.

(2c. I. R. stamp.)

"ELIAS BIXLER."

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Which check is endorsed as follows :

*Francis N. Burgoon,*

and offered to prove that the signature thereto was in the hand-writing of plaintiff, but the defendant objected to the admissibility of said proof, and the same was admitted subject to exception. And proved by a competent witness, that during the week preceding the trial of this cause, the defendant said that he remembered the circumstance of said check, because he had to be identified when he presented the check at the bank, and got the money therefor. And further offered to prove by Edward Hoppe, that the body of said check was in the hand-writing of said Josephus H. Hoppe, deceased, but the defendant objected to the admissibility of said proof offered, the Court overruled the objection, and permitted the proof to be given, and the same was given to the jury ; whereupon the defendant excepted.

No valid objection can be urged to the admissibility of this proof. The check bears date on the same day as the note sued on, and is for the same amount, and the evidence offered tended to prove that the money for which the note was given, had been received from Bixler, the plaintiff, by the defendant, and not by *Hoppe*, the deceased.

*Second Exception.*—After the proof mentioned in the first exception (which is made a part of this exception) had been given, the plaintiff proved by the same witness that he is the son of Josephus H. Hoppe and that Josephus died about Christmas in 1877; and further proved by the same witness, which proof was objected to by defendant, and was taken subject to exception, that he did not know whether his father owed Bixler or not; that his father sent money by him to Bixler for interest two or three times; that the last time was two or three years ago; that either at the second time or another time, wit-

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ness took to Bixler from his father, more than the interest, that his father told him to take the money over to Bixler, his father's home was distant three or four miles from Bixler's, that he never heard his father and the defendant talk about a note to Bixler, or about owing any money to Bixler; on the second occasion on which witness took money over to Bixler by his father's direction, as before stated, the defendant was at witness' father's house, before witness started to Bixler's, and that defendant paid his father money, and counted it out to his father on the table, the amount of which was \$54, witness thinks, and his father afterwards gave witness that same money to take to Bixler and that he did so; that on one occasion when witness' father sent him with money to Bixler's, he said it was for interest on that note; that was all he said.

The plaintiff further proved by John Henry Hoppe, that he is the father of Josephus H. Hoppe, and offered to prove by the witness that in September 1878, witness met defendant at Crouse's hotel in Baltimore, and told him that the note which Bixler held against Josephus H. Hoppe and him, had been proved against the estate of said Josephus, before him; that the note sued on was not then present; that witness said it was strange that Joe should borrow money when there was no necessity, that defendant said he had got the money—that is, the \$900 mentioned in the said note to the plaintiff, in suit in this case—and that it was all right, and that it had been arranged with said Josephus H. Hoppe by him the defendant, in and by a check on the First National Bank of Westminster; that the note sued on was the only note proved before witness; but the defendant objected to the admissibility of said proof offered and the Court overruled the objection and allowed it to be given, and the same was given to the jury; whereupon the defendant excepted.

This objection was general and applied to all the testimony offered in this bill of exceptions. The rule is well

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settled that where a general objection is made to the admissibility of a mass of evidence offered, it is not error to overrule the objection if any part of it be admissible. *Budd vs. Brook*, 3 Gill, 220; *Emory & Gault vs. Owing*, 3 Md., 178; *Pettigrew vs. Barnum*, 11 Md., 434; *Morrison vs. Whiteside*, 17 Md., 452; *Everett vs. Neff*, 28 Md., 176.

Without meaning to express the opinion that any part of the testimony was obnoxious to objection, it is very clear that the testimony of the witness *John Henry Hoppe* was strictly pertinent and admissible, as tending to prove an admission made by the defendant as late as September 1878, that the consideration for the note had been received by him, and consequently that it was his debt.

*Third Exception.*—After the proof mentioned in the foregoing bills of exception had been given, the plaintiff proved by the cashier of the First National Bank of Westminster, that the check above mentioned was presented at the bank by the defendant and the money was paid to him.

The plaintiff then closed his case. Whereupon the defendant prayed the Court to instruct the jury “that the plaintiff has offered no legally sufficient evidence, of an acknowledgment or a promise by the defendant to take this case out of the Statute of Limitations, and that the verdict must be for the defendant under the pleadings and the evidence given by plaintiff.”

The refusal to grant this prayer forms the subject of the *third* bill of exceptions.

A reference to the proof contained in the several bills of exceptions, which has been stated at length, sufficiently shows that it was not error to refuse this prayer.

Without now considering the legal effect of the several payments made by J. H. Hoppe endorsed on the note, which will be noticed hereafter; the testimony of the witnesses *Edward*, and *John Henry Hoppe*, was legally sufficient to be submitted to the jury, from which they might

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find that a payment of interest on the note had been made by the defendant himself, within three years before the suit was instituted; and also an acknowledgment by the defendant in September 1878, of his liability upon the note. Therefore the defendant was not entitled to insist, as asserted in the prayer, that there had been a total failure of evidence to take the case out of the Statute.

*Fourth Exception.*—The defendant as a witness, in his own behalf, testified that at the time when he paid money to Josephus H. Hoppe as testified by the witness Edward Hoppe, he was indebted to said Josephus in the sum of \$975, for which Josephus held defendant's note, and that the money paid by him to Josephus was paid on account of that note; that before the death of Josephus, he had paid to him the whole amount of principal and interest of said note, and had taken up the same and here produced it, which note is as follows:

“Hopewell, April 18th, 1870.

“One day after date, I promise to pay to Josephus H. Hoppe the sum of nine hundred and seventy-five dollars, for value received.

“FRANCIS N. BURGOON.”

Which note is endorsed as follows, to wit:

“Interest on the within note up to April 1871, \$56.24; 1871 by cash, \$54.00; 1872 by cash, \$54.00; 1873 by cash, \$54.00; 1874 by cash, \$54.00.

“That the check of the plaintiff for \$900, given in evidence by plaintiff, was delivered to defendant on the day of the date of said note, and was so much of the consideration of said note;”—that is to say, said Josephus loaned the defendant on said occasion \$975, and delivered to him said check and \$75, in notes, and defendant gave him therefor said note for \$975, and paid the same in full to

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said Josephus in his life-time, as stated—whereupon the testimony on both sides was closed. *Three* prayers were then asked by the plaintiff and *four* by the defendant. The Court granted those of the plaintiff and refused those asked by the defendant, and this ruling forms the subject of the *fourth* bill of exceptions.

The plaintiff's *first* prayer is based on the testimony of *John Henry Hoppe*, and the jury were thereby instructed to find their verdict for the plaintiff, if they should find from the evidence, the making of the note by Josephus H. Hoppe and the defendant, that defendant received from the plaintiff the amount of money mentioned therein, and shall further find that "in September 1878 the defendant acknowledged that he had gotten said sum of money from the plaintiff, and that it was all right, and that it had been arranged in a check on the First National Bank of Westminster."

We see no valid objection to this instruction, the admission of the defendant, if believed by the jury, amounted in law to an acknowledgment of the debt, and was sufficient to remove the bar of the Statute.

The *second* prayer, to take the case out of the Statute, relied upon the payments of interest on the note, if the jury should find such payments, made by Josephus H. Hoppe in *March* 1871, and *April* 1874, and "that defendant on April 1st 1875 or 1876, or within a day or two before, or after said days, or either of them, paid or gave to said Hoppe \$54, as interest or on account of the note, and that said Hoppe on the same day, sent the said sum of \$54, to the plaintiff as and for interest on said note, and that said *Josephus* on the 1st of April 1876 or 1877, or within a day or two before or after said day, paid to the plaintiff any sum of money as principal or interest on the note."

The effect of part payment by one of two or more joint and several makers of a note, to prevent the bar of the



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Statute, was considered in *Ellicott vs. Nichols*, 7 *Gill*, 86, and has recently been again considered in *Schindel vs. Gates*, 46 *Md.*, 604. In these cases it was held as the settled law of this State, that such payment, if made before the Statute has attached, is sufficient to take the note out of the operation of the Statute as to all the makers; on the principle that the payment by one is payment for all. In such case the Statute runs from the time of the last payment. If this be more than three years before the institution of the suit the Statute operates as a bar. Now this prayer submits to the jury to find that the last payment made by Hoppe was in April 1876 or 1877. If made either in April 1876 or 1877, it was within three years before the institution of the suit, and would prevent the bar of the Statute, provided the previous payments had been made, as stated in the prayer, as was decided in *Schindel vs. Gates*, before cited. It was not error to grant the prayer.

The *third prayer* of the plaintiff embodies substantially the same facts contained in his *first* and *second* prayers, and was, therefore, properly granted.

We proceed to the consideration of the prayers offered by the defendant, numbered third, fourth, fifth and sixth.

Having said that the *first* prayer of the plaintiff was properly granted, it follows that there was no error in rejecting the defendants' *third* prayer, which asserts that there was no evidence legally sufficient, from which the jury could find an acknowledgment by the defendant of a subsisting obligation.

The *fourth prayer* claims that the verdict must be for the defendant, unless the jury find that the defendant did pay to the plaintiff the interest on the note, on or after the 28th of October 1875. This prayer is clearly erroneous, as it ignores entirely the testimony of the witness, *John Henry Hoppe*, and the other evidence in the case tending to support the action.

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The *fifth prayer* is also erroneous for a similar reason, as it bases the right of the defendant to a verdict in his favor, simply on a finding by the jury, that he was indebted to *Josephus H. Hoppe*, and paid to him the sum of \$54, as testified by the witness, Edward Hoppe, on account of his said indebtedness. That fact, if believed by the jury, would have impaired the force of the testimony of Edward Hoppe, so far as the same tended to prove a payment by the defendant of interest on the note sued on; but would not be conclusive against the right of the plaintiff to recover, upon the other testimony of the case.

The *sixth prayer* asserts that the plaintiff had given no legally sufficient evidence, from which the jury ought to find, that the defendant paid to the plaintiff the sum of fifty-four dollars, or any other sum of money, for interest on the note sued on, on or after 28th October 1875.

We think the jury might reasonably have found from the testimony of Edward Hoppe that the payment of \$54 by the defendant, deposed to by the witness, took place after the 28th of October 1875. But if it were otherwise, and there had been no such evidence, the rejection of this prayer would furnish no ground for reversal, as the fact therein stated is wholly immaterial, and its rejection caused the defendant no possible injury or damage.

To remove the bar of the Statute, it was not necessary to show a payment within three years by the defendant; a payment by Hoppe, the co-maker of the note, within the period mentioned would have the same legal effect as if made by the defendant himself.

*Judgment affirmed.*

(Decided 27th January, 1881.)

GUSTAV ADOLPH BUILDING ASSOCIATION, No. 1, OF  
BALTIMORE CITY *vs.* ALEXANDER KRATZ.

*Practice in Equity—Building Association Mortgage—When One-Half Commissions allowed Trustee to sell Mortgaged Premises—Order of Court giving Mortgagor Time to pay amount found due, with Interest—Failure to pay Taxes—Appeal from Order disallowing Commissions to a Trustee.*

K. being in default on a mortgage to a Building Association of which he was a member, on petition of the mortgagee, the Court passed a decree for sale, and appointed a trustee, who gave bond and advertised the property for sale. K. then filed a petition, alleging that he was not in default and praying an injunction to restrain the sale. The injunction was ordered, and the case was sent to the auditor, to state an account of what, if anything, was due the mortgagee. On exceptions by K., it was HELD:

1st. That K. being in default, the property was properly advertised for sale, and that the account allowing the trustee one-half commissions under rule of Court, and other costs incurred by the proceedings, was correct; and that an order of Court thereon was properly passed, in so far as it directed the mortgagee, upon payment to it of the sum of money found to be due by the account, to release the mortgage, and allowing to the mortgagee interest to date of payment; provided the payment was made within thirty days, until which time the restraining order was continued.

2nd. That the failure by K. to pay taxes was such a default as justified the advertisement of the property for sale.

The disallowance to a trustee of commissions to which he is entitled, is ground of appeal.

APPEAL from the Circuit Court of Baltimore City.

The case is stated in the opinion of the Court.

The cross-interrogatory to the appellee, alluded to in the opinion, was as follows: Have you paid State and City taxes for 1876, 1877 and 1878, on the property in

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question? Ans. No, sir. The exceptant objected to this cross-interrogatory, because, as he alleged, there was no proof that the taxes therein referred to were due and payable.

The cause was argued before BARTOL, C. J., BOWIE, MILLER, ROBINSON and IRVING, J.

*George G. Hooper*, for the appellant.

*Thomas R. Clendinen*, for the appellee.

IRVING, J., delivered the opinion of the Court.

It appears from this record that the appellant is a corporation, and that on the 29th of August, 1876, the appellee executed a mortgage to the appellant to secure eighteen hundred dollars advanced on twelve shares of the stock of the appellant. The appellee was a member of the corporation, and by the terms of his membership and the provisions of the mortgage, he was to pay to the appellant the weekly sum of six dollars, on every Thursday evening, until such time as the mortgagor should have eighteen hundred dollars to his credit by such payments, and the dividends passed to his credit. He was also to pay all ground rents and taxes, for which the property mortgaged "may become liable when payable."

There was a clause in the mortgage, consenting to decree for sale, "under the provisions of sections 782 to 792, inclusive, of Article 4, of the Public Local Laws of Maryland, and of Act 1864, ch. 124." This mortgage was duly recorded, and on the 8th of August, 1878, on the petition of the appellant alleging default, and asking decree, the Circuit Court of Baltimore City passed a decree for sale and appointed George G. Hooper, trustee. The trustee bonded and advertised the sale. Appellee then filed a petition alleging he was not in default, and

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praying an injunction to restrain the sale. The injunction was ordered ; and the case was sent to the auditor "to take an account of what, if anything, was due the complainant."

Upon the auditor's report and statement being returned it was excepted to by the appellee, because it had allowed the trustee one-half commissions and other costs incurred by the proceedings in Court.

The Court sustained the exceptions, and passed an order disallowing the commissions and costs, and ratifying the auditor's account in all other particulars. The order further provided that the appellant "upon payment to it of the thirteen hundred and ninety-five dollars and twenty-nine cents, is hereby directed to release said mortgage, allowing credit for such portion of such costs herein disallowed, as have been paid by said Kratz, allowing interest also to date of payment, provided said payment is made within thirty days, until which time the restraining order is hereby continued."

It is from this order that appeal is taken, and these grounds of appeal are assigned in the appellant's brief:

1. That there was a default on the part of the appellee, and the trustee justifiably advertised the property, and therefore the auditor properly awarded the trustee one-half commissions, under the 39th Rule of the Circuit Court of Baltimore City, and the complainant the costs of the proceeding.

2. That the Court erred in giving time for the payment of the money by the defendant, which should have been required to be paid immediately.

3. That the order does not provide for interest on the appellant's debt until time of payment.

We will consider these positions in inverse order.

The order of the Court, in our opinion, by proper construction, does allow interest on the appellant's claim to date of payment. The manifest purpose of the order was

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to provide for the deduction of such costs as had actually been paid by Kratz, and which that order disallowed to the appellant from the debt before interest was calculated. The striking out of the order of that provision for deduction of costs paid by Kratz, which this decision will require, will relieve the order of its supposed ambiguity.

The Court having taken charge of the matter, it was proper and according to practice to give the defendant a day to comply with the order, and the time given was not so unreasonable as to justify reversal because of it. It was, in fact, not a longer time than is usually allowed in cases of decree because of default in mortgage cases.

In respect to the first ground of error alleged, we think there was such default as justified the proceedings taken and the advertisement by the trustee of the property for sale, and that it was error in the Court below to disallow the commissions and costs allowed the appellant by the auditor, which disallowance could only be justified on the contrary theory. The computation, made by the auditor of the actual amount due the appellant on the mortgage, is not challenged, and it is not necessary for us to inquire whether any part of that sum was so far in arrear as to justify proceedings on the mortgage, inasmuch as there was a default which did justify what was done. The covenant of the mortgagor was to keep the taxes paid as they fell due. This he did not do. The appellee was notified that he had not paid them, and that they were overdue for two years. His reply was that he would not pay until he got ready. This he said to the trustee when he told him he must advertise if what was due, both of weekly dues and taxes, were not paid. In *Walker vs. Cockey*, 38 Md., 75, this Court held that a failure to keep the property insured, as provided for in the covenant in the mortgage, was a default which justified proceeding under the mortgage. The default in this case was a violation of the covenant, and for the same reason justified the trustee in

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advertising, after his interview with the appellee already alluded to. The objection of the appellee, that the evidence was insufficient to show taxes due, cannot be maintained. The mortgage recognized that the property would become liable for taxes, and the appellee, on being told they were due and in arrear for two years, did not deny it, but only said he would pay them at his pleasure.

In regard to the exceptions to testimony taken before the auditor, it is unnecessary to pass upon any except that which was made to the cross-interrogatory to Kratz, No. 62. That was clearly proper. It was an inquiry of the party defendant touching a matter directly involved and about which his admission was important and admissible evidence. It is admitted that Rule 39 of the Circuit Court of Baltimore City allows one-half commissions to trustees in all cases where payment is made after sale has been advertised, but before it is made. The sale having been advertised, and properly so, the trustee was entitled to his commissions as a matter of right, and the disallowance was error and good ground of appeal. The costs, from the allowance of which no appeal lies, and intended by the Court in *Cecil, Adm'r vs. Rose, et al.*, 14 Md., 64, and *Crump's Case*, 42 Md., 192, do not include commissions to trustees. It follows from what we have said that the auditor's report should have been ratified without striking anything from it, and that the order appealed from must be reversed, in so far as it did disallow costs and commissions included in the audit and did allow the appellee credit for any costs paid by him on the debt due the appellant. The cause will be remanded to the end that payment may be enforced according to the principles of this decision.

*Reversed with costs,  
and cause remanded.*

(Decided 27th January, 1881.)

LOUIS N. FRANK *vs.* ROBERT D. MORRISON, GEORGE J. APPOLD, SAMUEL SNOWDEN and JOSEPH FRIEDENWALD, Receivers of THE FRANKLIN LAND AND LOAN COMPANY.

*Subscription to the Stock of a Land and Loan Company—Statute of Limitations—Interest—Remitter—Art. 5, sec. 14, and Art. 29, secs. 39 and 40, of the Code.*

F. subscribed for and agreed to take five shares of the stock of a Land and Loan Company, and to pay \$400 per share therefor, in weekly instalments of one dollar on each share until paid in full; and his name as such subscriber by his direction was entered by the company's secretary on its stock ledger about the 16th of February, 1871, on which day he made his first payment, and continued to pay until the 4th of June, 1874, and had the payments entered in his book and received his dividends. On a suit by the receivers of the company brought the 18th of March, 1879, to recover the instalments, which he had failed to pay for more than 150 weeks last past, it was HELD:

- 1st. That the Statute of Limitations was no bar to the action, as F. was bound by his contract to pay in weekly instalments, though the time of payment was extended beyond the period of two years prescribed by the Act of 1868, ch. 471, sec. 59.
- 2nd. That this subscription was not within the class of contracts on which interest is recoverable as of right.
- 3rd. That this Court has no power to modify the judgment in this case, in which the jury were instructed to allow interest, as a matter of right, on the several weekly instalments from the times they respectively fell due, by remitting the amount of such interest. Such case does not fall under Art 5, sec. 14 or Art. 29, secs. 39 and 40, of the Code.

APPEAL from the Baltimore City Court.

The case is stated in the opinion of the Court.



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*Exception.*—At the trial the plaintiffs offered three prayers, none of which is it necessary to set forth. The defendant offered thirteen prayers, of which the following only need be stated :

9. That the Franklin Land and Loan Company was not authorized by the Act of Assembly of 1868, ch. 471, and the amendments thereto, and its charter, to provide for the payment of its stock, in the manner set forth in Article III of its by-laws, and therefore the plaintiffs are not, under the pleadings and evidence in this case, entitled to recover.

12. That the cause of action in this cause did not accrue within three years next before this suit, and the verdict must therefore be for the defendant.

The Court (GAREY, J.,) granted the plaintiffs' prayers, but rejected all the defendant's prayers, except his eighth prayer. The defendant excepted, and, the verdict and judgment being for the plaintiffs, the defendant appealed.

*Samuel J. Harman* and *M. R. Walter*, for the appellant.

The subscription must be in writing.

What is the writing in this case? It is the entry of Frank's name by the company's secretary in the book known as the Stock Ledger. The by-laws are not in this ledger, nor is there any direct or indirect reference to them. What is the effect of this entry in the Stock Ledger? It is equivalent to a subscription to a contract containing the Act of 1868 and the certificate of incorporation, and the said Act and certificate, therefore, constitute the contract of subscription. The by-laws form no part of it. *Act of 1868, sec. 44; Small vs. Herkimer Manf. Co.*, 2 *Comstock*, (N. Y.) 335, 341; *Thiepgen vs. Miss. Cen. R. R. Co.*, 32 *Miss.*, 356.

Even had the by-law which provides for payment in weekly instalments been made by express agreement, a

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part of the said contract, it would be void, because not sanctioned by the Act of Assembly. No corporation can exercise a right or power which is not expressly granted or does not exist as an incident to the power so granted. *Angell on Corporations*, secs. 111, 256, 271. By sec. 50 of the Act of 1868, corporations formed thereunder have authority to adopt by-laws not inconsistent with the Statute Law. Sec. 59 of the Act of 1868, provides that the capital stock of *all* corporations created thereunder *shall* be paid one-half in one year, and one-half in two years from and after the incorporation of the company, or such corporation *shall* be dissolved. The by-law of the "Franklin" providing for the payment of the stock in weekly instalments, which would have taken nearly eight years, is in direct conflict with sec. 59, and is, therefore, void.

Assuming for the purposes of the argument that the said by-law was equally with the Act of Assembly and the certificate of incorporation a part of the contract—what then? The Court would be asked to construe it, and to deal with it as with any other written contract containing inconsistent provisions, and as here the Act of Assembly is paramount, the Court would hold that section 59 must prevail over the by-law, and that the latter must be void.

Suppose the receivers had immediately after their appointment instituted suit for the entire balance of the unpaid subscription, and the appellant had set up the by-law, what would the receivers have answered? That is not your contract of subscription. Your contract is the Act of 1868, and the certificate of incorporation. Sec. 59 regulates the payments, and by that you are bound. Your subscription is an announcement to the world that you have subscribed under said Act and certificate. The creditors have credited you upon that subscription, and you are, therefore, estopped from setting up a by-law

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adopted by the corporation, allowing you to pay in weekly instalments. The law did not authorize any such by-law, and we can be affected only by what the corporation had a legal right to do. As estoppels are mutual, the receivers must be held to be bound in this case as fully as the appellant would have been bound in the hypothetical case.

The question of forfeiture is neither incidentally nor collaterally involved here, and *Musgrave's Case* has, therefore, no application upon that point. The appellant's ninth prayer should have been granted.

2. As sec. 59 constituted part of the contract of subscription, the receivers had the right to collect the entire balance of the subscription when they demanded payment of the appellant in October, 1875. This suit having been brought more than three years after the entire subscription was due and payable, and after the appellant's denial of his liability, the claim was barred by limitations, and the twelfth prayer should have been granted.

Limitations can be pleaded in this suit, because limitations begin to run on a claim against a stockholder as soon as there is a relinquishment of business by the corporation, or as soon as receivers are appointed. *Curry vs. Woodward*, 53 Ala., 371, 376; *Scoville vs. Shaw*, 4 Clif., (C. C.) 567.

3. The appellees' three prayers should not have been granted. They allow interest as a matter of right. *Musgrave's Case*.

4. This Court cannot enter judgment for less than the verdict. The allowance of interest, as a matter of right, was erroneous, and the judgment must, therefore, be reversed, and a new trial granted.

*Robert D. Morrison* and *Samuel Snowden*, for the appellees.

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The non-compliance of the subscription with sec. 59 of the Act of 1868, ch. 471, as to the time in which it should be fully paid up, does not affect its validity. The contract between the appellant and the corporation rests upon the terms of the by-law, the validity of which he is estopped from denying. *Musgrave's Case*, 54 Md., 161; *Dorsey's Case*, 48 Md., 461.

As all the instalments on the stock sued for in the case became due between April 1st, 1876, and March 18th, 1879, the Statute of Limitations could not apply. The position of the appellant requires that the Court should imply a contract, although it is conceded that an express contract was made, which clearly cannot be done. *Stockett vs. Watkins*, 2 G. & J., 341.

The claim made in this case is for money due for an unpaid subscription to the capital stock of the corporation, which, it is well settled, constitutes a trust fund in the hands of the stockholder, who is, by reason of the possession of such fund, a trustee. *Thompson on Liability of Stockholders*, secs. 10 and 11; *Wood vs. Dummer*, 3 Mason, 311; *Rider vs. Morrison*, 54 Md., and because he is such trustee, he cannot be allowed to set off an indebtedness owing to him by the corporation against a claim for such unpaid instalments, because the claims are not in the same right—one being owing to him as an individual, and the other owing by him as trustee. *Sawyer vs. Hoag*, 17 Wall., 610, and a bill in equity will lie against such stockholder, because he is trustee. 1 *Hughes Ct. Ct.*

As he holds the unpaid subscriptions as trustee of an express trust, the Statute of Limitations is not a good plea in bar of a suit for such unpaid subscriptions. *Thompson on Liability of Stockholders*, sec. 282; *Hightower vs. Thornton*, 8 Ga., 486 (502); *Payne vs. Bullard*, 23 Miss., 88.

The prayer of the appellees directed the jury to give interest as a matter of right. This was done in order to

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get the question of interest settled; but pending this appeal, the Court, without hearing any argument, expressed an opinion in reference to interest in *Musgrave's Case*. The appellees are entitled to interest as matter of law. The sum due is ascertained by the written contract, for he agreed to pay for the stock in weekly instalments, on every Thursday evening, to the directors. *Newson vs. Douglas*, 7 H. & J., 453.

As, therefore, each instalment fell due, it was an ascertained amount on which the corporation was entitled to interest as a matter of right. It was, in fact, an incident to the debt, founded on the agreement of the parties, and the Court is bound to allow it as damages, which the party is legally bound to pay, for the detention of money improperly withheld. *Sedgwick on Damages*, top p. 463-475 and 476; 6 Am. Dec., 185 and note, 188 and 196.

The appellant knew the amount of the instalments to be paid as they became due, and when and where the payments were to be made; and having omitted to make such payments, he is now bound to pay interest thereon. *The People vs. New York*, 5 Cowen, 331, 334; 4 *Wail's Actions and Defenses*, 127; *Scarlett vs. Academy of Music*, 43 Md., 203.

But even if the question is considered by the Court to be settled by the decision in *Musgrave's Case*, the appellant is not injured by the judgment, and therefore the Court will not reverse the same, as it is merely a calculation of the amounts as ascertained from an undisputed contract made by the appellant. *Benson vs. Atwood*, 13 Md., 21, (57.)

Certainly the appellant could, under no circumstances, suffer more than the amount of the interest allowed by the jury, which sum the appellees are willing and hereby offer to remit. This Court is authorized to allow an amendment of the judgment, or any entry necessary to correct the error. *Revised Code*, Art. 71, sec. 19.

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MILLER, J., delivered the opinion of the Court.

In this case an action of *assumpsit* was brought on the 18th of March, 1879, by the Receivers of the "Franklin Land and Loan Company of Baltimore City" to recover from the appellant certain unpaid instalments on his subscription for stock. The declaration contains a special count, charging that prior to the 1st of April, 1876, the defendant subscribed for and agreed to take five shares of the stock of said company, and to pay \$400 per share therefor, in weekly instalments of one dollar on each share until paid in full, and that he has failed to pay such instalments for more than one hundred and fifty weeks last past.

It is agreed that most of the questions presented by the rulings of the Court upon the several instructions offered on both sides have been settled by the decisions of this Court in the cases of these same *Receivers* against *Dorsey*, 48 Md., 461, against *Musgrave*, 54 Md., and against *Rider*, 54 Md. Practically, the only question now open is, whether the Statute of Limitations is a bar to the action? And as to this, it is conceded that if the contract set out in the declaration to pay for the shares, in weekly instalments of one dollar per share, is to be treated as the real contract between the corporation and the subscriber, the Statute does not apply. The proof in the case shows the name of the defendant, as a subscriber for five shares, was written on its Stock Ledger by the company's secretary, and as he believes, though he has no distinct recollection on the subject, by the defendant's direction. This ledger is simply headed "Franklin Land and Loan Company of Baltimore City," and in one column are set out the names of the subscribers, in another the number of shares opposite each name, and in others the weekly payments of dues, interest and fines made by each. The name of the defendant, as a subscriber for five shares, seems to have been thus entered about the 16th of February, 1871. On

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that day he made his first payment of \$7.75, being five dollars for dues or the first instalment of one dollar per share on his stock, two dollars and a half for an entrance fee, and twenty-five cents for a small book then given him, in which were subsequently entered the weekly payments made on his five shares. This book contained also the printed by-laws of the company, one of which is to the effect that the capital stock of the company shall be \$400,000, divided into one thousand shares of the par value of \$400 each, payable in weekly instalments of one dollar per share until the whole is paid. It was customary to give a similar book to all subscribers, and the defendant having received his, he continued to pay, and had entered therein his weekly instalments on the five shares up to the 4th of June, 1874, making in all \$927.65, and then stopped paying. During that time he also received and receipted for dividends on his stock, which the company declared each year.

Now in order to let in the Statute of Limitations it has been argued with much ingenuity by the appellant's counsel that this must be treated as a contract to pay for the stock in full within two years, as provided by the Act of 1868, ch. 471, sec. 59. The argument, briefly stated, is that this company was incorporated under this Act of 1868; that by sec. 59, of that Act it is required that the capital stock of every corporation shall all be paid in one-half in one year, and the other half in two years from and after its incorporation; that by sec. 50 of the same Act a corporation has authority to adopt such by-laws only as are not inconsistent with law; and as a by-law which authorizes, as in this case, the stock to be paid up after a longer period than two years is inconsistent with sec. 59, it is therefore void; that although in a suit by receivers representing creditors a subscriber will not be permitted to say such a subscription is void, still it must be held that sec. 59, formed part of the contract of sub-

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scription, and the by-law being void, it must be treated and construed as a contract to pay within two years under this section; and the conclusion which is irresistible from the premises, is that the receivers had the right to collect the entire balance when they demanded payment in October, 1875, and the defendant denied his liability, and as this suit was brought more than three years thereafter the claim is barred by limitations. But it seems to us that the validity of the by-law has nothing to do with the question. The facts above stated, place it beyond doubt that the contract *actually made* between the corporation and the defendant was that he should pay for his stock in weekly instalments of one dollar per share until the whole was paid, and it is entirely immaterial whether there was a by-law providing for such payment or not. In other words if a corporation created under this Act receives subscriptions to its stock from one or all of its subscribers under *express contracts* with them, requiring payment only in weekly instalments, and thereby extending the time of payment beyond two years, such contracts are equally open to condemnation under sec. 59, whether made under or independent of any by-law to that effect. If such contracts are void, they must remain void. They cannot be made valid by construing them to be such as this section authorizes when the parties themselves have expressly contracted to the contrary. We are therefore brought at last to consider what is the effect and operation of this section? And this question has been completely answered by our former decisions. The section declares that "the capital stock so fixed and limited shall all be paid in, one-half thereof in one year, and the other half thereof in two years, from and after the incorporation of said company, *or such corporation shall be dissolved.*" In *Musgrave's Case* it was contended that no action would lie to enforce payment of the defendant's subscription because it was not made payable in two years, as prescribed



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by this section, but we said: "This provision applies only to proceedings by the State for the dissolution of the corporation itself, and it is well settled that the cause of forfeiture cannot be taken advantage of collaterally or incidentally, or in any other mode than by a direct proceeding instituted for that purpose against the corporation. The State creating the corporation can alone institute such a proceeding, since it may waive a broken condition of a compact made with it." It is plain, therefore, from what was decided in that case, that the defendant in this cannot escape the obligation of his contract to pay, in weekly instalments, because by reason of that contract the time of payment is extended beyond the period of two years prescribed in this section, and it follows that the Court below was entirely right in rejecting his ninth and twelfth prayers.

In *Musgrave's Case* it was decided that the instructions granted at the instance of the plaintiffs *properly left* the question of the allowance of interest on the several weekly instalments from the times they respectively fell due, to the *discretion of the jury*. In the present case, by the granting of the plaintiffs' prayers, the jury were instructed to allow such interest as matter of *absolute right*. Upon further argument of this question, (which has been allowed,) we adhere to the views expressed in the former case. In Maryland the leading case on this subject is *Newson vs. Douglass*, 7 H. & J., 417, in which it was held that while there are cases in which interest is recoverable as of right, such as bonds, contracts in writing to pay money on a day certain, such as bills of exchange or promissory notes, or contracts for the payment of interest, or where the money claimed has actually been used, yet with such exceptions it has long been the settled practice of the Courts of this State to refer the question of interest entirely to the jury, who may allow it or not in the shape of damages, according to the equity and justice appearing

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between the parties on a consideration of all the circumstances of the particular case as disclosed at the trial. And in the recent case of *The Baltimore City Pass. R. R. Co. vs. Sewell*, 37 Md., 443, the same doctrine was re-affirmed. In our judgment, a subscription for stock in a corporation, to be paid for in instalments, is not such a contract as falls within the class of those on which interest is recoverable as of right.

For this error in the plaintiffs' prayers, it is conceded the judgment must be reversed and a new trial awarded, unless this Court has power to modify the judgment as the appellees' counsel have suggested. In their brief they offer to remit the amount of interest allowed by the jury, and ask that the judgment be modified accordingly. But, in our opinion, no power has been conferred upon the Appellate Court to make the proposed modification. The judgment in the Court below upon the verdict is entirely correct, and the case does not fall under sec. 14 of Art. 5, or secs. 39 and 40 of Art. 29 of the Code.

*Judgment reversed, and  
new trial awarded.*

(Decided 27th January, 1881.)

THE BRICK COMPANY OF BALTIMORE CITY and ROBERT  
RIDDELL BROWN and DAVID STEWART, Trustees *vs.*  
JOSEPH J. ROBINSON, SR.

*Injunction Restraining Sale of Property (advertised Free of  
Incumbrances) by a Junior Mortgagee—Receivers.*

A. and J. M. had a vendor's lien for unpaid purchase money on land in Baltimore County, sold by them in 1877 to the B. Co., which land the Company held under a bond of conveyance from the M. To enforce their lien the M. in February, 1880, instituted proceedings in equity, making all incumbrancers parties. In December, 1878, R. filed a mechanic's lien against buildings and fixtures on the land. He obtained judgment in February, 1880, on notes, for the amount of his lien in the Baltimore City Court, on which he issued execution, on the 8th July, 1880, to Baltimore County, to obtain a lien on the personal property of the B. Co.; he also instituted proceedings on his mechanic's lien claim to sell the property bound by it. On the 8th March, 1879, the B. Co. executed a mortgage to P. and H. of the land and of its machinery, &c., and personal property. On the 24th March, 1879, the B. Co. executed another mortgage of the land and another of the machinery, &c., and personal property to B. and S., trustees. B. and S., trustees, under the powers in the mortgages to them, advertised all the property of the B. Co. for sale on the 12th July, 1880, free from all incumbrances, and to give possession to purchasers. R. on the same day applied to the Circuit Court for Baltimore County, wherein the proceedings of the M. and of R. were pending, for an injunction to restrain B. and S., trustees, from selling, and for the appointment of receivers of the B. Co. The Court, on the bill and exhibits, granted the injunction and appointed receivers. **Held:**

That the injunction was properly granted, as to the personal property; and that as to the real estate, B. and S., trustees, should be restricted to selling their equitable interest in the real estate subject to the prior liens; but that the appointment of receivers was premature.

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Brick Co., *et al.* vs. Robinson.

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APPEAL from the Circuit Court for Baltimore County.

The case is stated in the opinion of the Court. The bond of conveyance therein mentioned was executed on the 1st September, 1877; the proceedings on their vendor's lien were instituted by the Mandersons on the 27th February, 1880. Robinson obtained his judgment on the 12th February, 1880. Brown and Stewart, trustees, advertised the property of the Brick Company for sale on the 12th July, 1880, and on the same day Robinson applied for and obtained the injunction restraining the sale, and the appointment of receivers to take charge of the property of the Brick Company.

The cause was argued before BARTOL, C. J., ALVEY, ROBINSON and IRVING, J.

*Robert Riddell Brown* and *David Stewart*, for the appellants.

*L. H. Robinson* and *Albert Ritchie*, for the appellee.

IRVING, J., delivered the opinion of the Court.

The questions for our decision, in this case, may be resolved into two: *First*. Does the appellee's bill of complaint, which was filed in the Circuit Court for Baltimore County, present a case for injunction such as was issued by that Court: and *secondly*. Was the order appointing receivers justified by the case made by the bill, on the filing of which the Court immediately passed the order for injunction and appointing receivers.

The bill alleges that the Brick Company of Baltimore City (one of the appellants) is indebted to the complainant in the sum of \$2614.42, with interest, upon a mechanic's lien duly filed in the office of the Clerk of the Circuit Court for Baltimore County, on the third day of December, 1878, a copy of which lien is filed: That the Brick

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Company's title to the real estate rests on a bond of conveyance from Andrew Manderson and James Manderson, who have a claim against the same for purchase money, amounting to twenty-five thousand dollars, to secure which they hold a vendor's lien which is superior to complainant's mechanic's lien; and that to enforce the same the Mandersons have instituted proceedings in equity in the same Court wherein this suit is instituted, not only against the Brick Company, but also against all junior incumbrancers, all of whom are made parties, which proceedings were still pending at the filing of this bill. A copy of the bond of conveyance is filed as an exhibit, and complainant refers to the other bill and proceedings in same Court, and prays to make them a part of his bill. It also alleges that on the 8th of March, 1879, the Brick Company executed a mortgage of the real estate belonging to it, and of its engines, machines, machinery, fixtures, patents and patent rights to Poole & Hunt, to secure \$7900 due that firm; all of which is unpaid and unsatisfied. A copy of this mortgage is also filed as an exhibit. It also charges that on the 24th of March, 1879, the Brick Company executed a second mortgage on the real estate, and second mortgage on the engines and personal property to the appellants, (Robert Riddell Brown and David Stewart) trustees, to secure the payment of the claims of sundry *cestuis que trust* mentioned in these two mortgages, and that in these last mentioned mortgages there was a power of sale given to the trustees to sell in case of default on the part of the mortgagors. The principal of the claims secured by these mortgages was payable five years from date, but the interest on all was payable semi-annually. Copies of these mortgages, duly acknowledged and recorded, were filed as exhibits. It is also charged in the bill that the complainant's mechanic's lien has priority over all these mortgages and liens, except the lien for purchase money, and that in addition to the mechanic's

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lien the complainant had notes for his claim upon which he had obtained judgment in the Baltimore City Court for \$2774.83, upon which, on the 8th of July, 1880, an execution issued to Baltimore County, and that, by virtue of this judgment and execution, the complainant had acquired a lien on all the property of the Brick Company situated in Baltimore County, and that, on his mechanic's lien claim, he had instituted suit in this Court, to the September Term, 1879, to secure a sale of the property bound by his mechanic's lien, and prays leave to refer to this suit and proceedings and make the same a part of his bill.

The bill then charges, that notwithstanding the pendency of all these suits to affect the property, and to secure the sale thereof, and notwithstanding all these prior liens resting on the same, the appellants, Robert Riddell Brown and David Stewart, trustees, under the mortgages to them, and pretending to act under the authority of those mortgages, and without any other authority, or consent of any of the other lienholders had advertised to sell all the property of the Brick Company real and personal, and all its franchises, clear of incumbrances, at public auction, and unless restrained would sell all of said property, and that such sale would not only be without authority, but would lead to litigation, waste the property of the Company, hinder and delay the creditors of the Company, and jeopard and endanger the security of the complainant, and the other creditors; whilst all the rights of all the parties can be fully secured through the suit of *Manderson, et al.*

A copy of the newspaper, containing the advertisement of sale, is filed as an exhibit. The entire suspension of business by the Brick Company is alleged, and the utter insolvency of the concern. The bill charges, that, the trustees, Brown and Stewart, are not in possession of any of the property proposed to be sold; nor are they entitled to possession, or to deliver possession thereof to a pur-

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chaser; but it charges that with the assistance of a majority of the directors of the Brick Company, who are themselves *cestuis que trust* under the mortgage to them, they intend to deliver the property, real and personal, to the several purchasers thereof, and intend to take and receive the entire proceeds of sale to the derogation of the rights of the complainant; and, that the property and effects of the company, already inadequate to the payment of all the debts of the Brick Company, are in imminent danger of being wholly lost to the complainant and other creditors, unless taken into possession by the Court for the benefit of the complainant and other creditors, who have no remedy save in a Court of equity.

The prayer is for injunction, and that receivers may be appointed, and for a sale of all the property to pay liens according to priorities. All parties in interest are made defendants. From this narrative it appears, that the appellee had the first lien on the real estate of the Brick Company, after the vendor's lien of Andrew and James Manderson should be satisfied; and that through an execution, which he had had issued upon his judgment, recovered in Baltimore City, against the Brick Company, he was seeking to obtain a lien on the personal effects of that Company in Baltimore County, if he had not actually acquired it as alleged in the bill.

The Brick Company had only an equitable title to the real estate, the same being held by bond for the conveyance thereof on payment therefor, which conveyance was not made because the purchase money was not all paid. Upon that equitable title Poole & Hunt held the first mortgage, (which was, in fact, the third lien in regular order), and they held, also, the first mortgage on the machinery, fixtures and patent rights of the Brick Company. The title, therefore, which Brown and Stewart took to the real estate was only the right to the equity of redemption of the equitable estate of the Brick Company,

which equitable estate was subject to two liens having priority over even Poole & Hunt; and their mortgage title to the machines, machinery, fixtures and patent rights was only to the equity of redemption thereof. If there was any personal property not included in the mortgage to Poole & Hunt, on it they took the first lien. From this statement of facts, coupled with the averment of the bill, (which is supported also by affidavit,) that the appellants had no authority from any other source to make this sale, which they had advertised to make, except through the power in their mortgage, it is clear that they had no power or authority to make the sale in the manner proposed, viz., "free from all incumbrances," and to give rightful possession to the property, either real or personal, which they advertise they will do. \* Notwithstanding they are without lawful authority to do what by their notice of sale they propose to do, the appellants insist that the appellee has no right to complain and will not be injured by the sale proceeding. They insist that, according to his own showing in the bill, the appellee holds a lien on the real estate prior to the lien of the trustees, under which they sell or propose to sell, and that such sale could not defeat their claim or impair their right; but that it would remain unaffected. To sustain this view, we are cited to *Union Bank of Maryland vs. Poultney*, 8 G. & J., 324; *Tome vs. Merchants' and Mechanics' Building and Loan Company*, 34 Md., 12, and *Hardy vs. Smith*, 41 Md., 1. We think the circumstances of this case clearly take it out of the reason and principle controlling the decisions of this Court in the cases cited. The fact that in this case the advertised purpose of these trustees was to sell an unincumbered title, distinguishes it from the cases to which we are referred. In the *Union Bank Case* the bill sought to restrain a sale under execution, in which it was only proposed to sell the equitable interest of the defendant, and the Court most properly said that



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such sale would not prejudice his rights as prior incumbrancer. In *Tome's Case*, 34 *Md.*, 12, the applicant for injunction was refused the writ, because he was not a party to the proceedings under which the decree for sale sought to be enjoined, was passed; and he was not, therefore, in danger of loss; for there was no proposal to sell, discharged of his lien as prior mortgagee. The case of *Hardy vs. Smith*, 41 *Md.*, 1, was not a case of injunction, but presented a controversy for the distribution of proceeds of sale, and the Court held, that the unauthorized announcement, at the sale, by the trustee, that he was selling a clear title, had no effect to transfer any title, save that which the decree authorized to be sold, the other mortgagee not having been a party to the proceedings.

The appellants, Stewart and Brown, the trustees, by their advertisement of sale, avowed their purpose to sell a clear title. As we have before said, the title in them was only the equity of redemption of an equitable estate, so far as the real estate was concerned. They were not selling, under a decree of the Court passed for the purpose of selling for the benefit of all lien-holders; but they were selling under the power contained in their mortgage, which was, in fact, the third lien in order.

The necessary inference, which the public would draw from their advertisement, would be, that, they had authority from the other lienors to so sell; which they had not. Such a sale, under such announcement, might have subjected the appellee to serious trouble and litigation, and ought to have been prevented by proper injunction. Notwithstanding the several proceedings alleged to be in progress in the Circuit Court for Baltimore County, the trustees might have sold the equitable interest of themselves and their *cestuis que trust* in the real estate, and the alienee thereof, *pendente lite*, would have taken subject to the rights of the prior incumbrancers, and would be bound by any decree that might be obtained for a sale of the

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property under the proceedings pending ; but they should be confined by proper restraining order to selling only the equitable interest which they hold. The lien-holders have a right to have the entire title sold by proper authority, that the estate may bring the largest possible sum for their common benefit.

With respect to the personal property, we think the injunction was properly granted. The appellants, Stewart and Brown, trustees, by their mortgage, only acquired a lien on the equity of redemption thereof, unless there be some of which the bill and exhibits do not inform us. They were not entitled, under their mortgage, to the possession of the property, for a prior mortgage existed thereon. They could not lawfully sell and deliver possession of that property ; for according to the allegations of the bill, to which we must look for the purposes of this decision, they had no authority whatever, except that derived from their mortgages, and were acting without the assent, and in defiance of the rights of prior lien-holders. The appellee, if he had not actually acquired his lien on the personal property, had issued his execution to Baltimore County, and was endeavoring to secure a right to payment from the surplus thereof, after satisfying prior liens. Looking to the character of the trustees' title, they certainly should not be permitted to take possession thereof, and sell and deliver, and thereby scatter the property, to the prevention of the schedule thereof by the sheriff, and the utter defeat of the appellee's lawful efforts to obtain a lien, which could, in no way interfere with, or impair the lien of the trustees, Stewart and Brown. It may be true, that until the complainant alleged and proved that the personal property was of uncertain value, and that the mortgagor had no other property than that which was mortgaged, to which complainant could resort ; or that it was of value in excess of the liens prior to the complainant's, so that he would

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be entitled to share in the surplus it might bring; he might not be entitled to a decree for its sale for his benefit. But by amendment of his allegations, and producing proof in the further progress of the cause, that difficulty may be entirely removed.

Meanwhile, the trustees, the appellants, who, so far as appears by the record, have no authority or right to sell and deliver the personal property, ought not to be permitted to sell as they proposed and advertised to do. Their action was unwarranted; and we think the complainant laid sufficient ground against them for enjoining the sale of personalty by them.

In appointing receivers, however, without waiting for the appellants to be heard in respect to the application, the Court erred. The circumstances of this case are not such as made it an exception to the rule, that "a receiver should not be appointed until after answer." In *Clark vs. Ridgely*, 1 Md. Ch. Dec., 71, the CHANCELLOR says, "the grounds which will induce the Court to disregard this old rule must be strong and special." In *Blondheim vs. Moore*, 11 Md., 374, Judge LE GRAND says, "the power is a delicate one, and is to be exercised with great circumspection. The Court must be satisfied by affidavit that a receiver is necessary to preserve the property. Fraud or imminent danger must be clearly proved, and unless the necessity be of the most stringent character, the Court will not appoint until the defendant be heard in response to the application."

From the averments of the bill we see no exigency requiring such haste, as the Court below thought necessary. The injunction would prevent the sale, and for the time being prevent the waste or loss of the property to the creditors. By it the rights of the appellee were sufficiently secured until the appellants could be allowed a hearing on that question and the injunction also.

The order granting the injunction, so far as it relates to the personal property, will be affirmed; so far as it

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relates to the real estate, the order should be so modified as to restrict the trustees in selling, to a sale of their equitable interest in it only, and subject to all prior liens; so far as the order provides for receivers, and puts the property, real and personal, in their hands, the same is reversed as prematurely granted.

The cause will be remanded to the end that the order appealed from may be so modified as to conform to this decision.

*Affirmed in part, and  
reversed in part, and  
cause remanded.*

(Decided 27th January, 1881.)

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WASHINGTON BOOTH, JOSEPH W. JENKINS, D. J. FOLEY & BRO., and others vs. JOHN M. ROBINSON, SAMUEL M. SHOEMAKER, THE BALTIMORE STEAM PACKET COMPANY, THE POWHATAN STEAMBOAT COMPANY, and others.

*Personal Responsibility of Directors of a Corporation—Transactions between Corporations where Directors in the one are Directors in the other—Form of Proceeding on the part of Stockholders to call Directors to an Account—Evidence—Powers of a Corporation—An absolute Bill of Sale intended as a Mortgage.*

In proceedings in equity by shareholders of the stock of a corporation, for the purpose of obtaining redress for what was alleged in the bill, to have been their loss in the value of their shares of stock, by reason of certain wilful and fraudulent mismanagement of the affairs of the corporation by some of its directors, (against whom and the corporation itself, and another corporation, of which they

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were also directors, and in whose interest it was alleged, they had so acted, the bill was filed)—to accomplish objects and purposes adverse to the interest of the stockholders of the corporation first mentioned, it was HELD:

That to render the directors personally liable for alleged injuries occasioned by conduct wilfully fraudulent, in intent and purpose, amounting to breaches of trust, the proof in support of the allegations must be other than mere constructive fraud or breaches of trust; that there must be affirmative proof of the misconduct charged, going to establish the fraud in fact.

In equity, directors of a corporation are personally liable for the consequences of frauds or malfeasance they may be guilty of, or for such gross negligence as may amount to a breach of trust, to the damage of the corporation or its stockholders; but they are not liable for the consequences of unwise or indiscreet management, if their conduct is entirely due to mere default or mistakes of judgment. And the *onus* of proof of fraud, combination or gross negligence, to render directors personally liable, is upon the party making the charges; which must be distinctly made, and fully supported by proof.

There is no legal presumption of illegality or unfairness, in transactions between two corporations, from the mere fact, that a portion of the board of directors in the one company constitute a part of the board of directors in the other at the same time, and participated in the dealings between the two corporations. It is only when their dealings are shown to be prejudicial to the one or other of the corporations represented by them, that their conduct will be subject to a strict and severe scrutiny by the Courts.

The corporation is the proper and primary party to call the directors to an account in a Court of equity for fraud or breaches of trust in the management of its affairs. To enable a shareholder, either for himself alone, or for himself and others, to maintain a bill against directors for such fraud or breaches of trust, he must allege and show not only the violations of duty or breaches of trust on the part of the directors, but that he as stockholder has been damnified thereby, and that the corporation has failed or refused to take the proper legal steps for the redress of the wrong. But if on a bill filed by stockholders, the proof should sustain its allegations, that a majority of the shares of the corporation are owned by another alleged rival company, and that a majority of the directors of the alleged fraudulently managed corporation are adverse to the

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interest of the complainants, and are combined against them, and would by means of the control that they exercise, frustrate and defeat any attempt to induce the corporation to take action for the redress of the wrongs alleged; such facts would be a sufficient excuse for not making or alleging a formal demand upon the corporation to take action, especially where the rival company and the alleged fraudulently managed corporation are both made defendants.

A corporation may invest in the stock of other corporations as well as in any other funds, provided it be done *bona fide* and with no sinister or unlawful purpose, and there be nothing in its charter or in the nature of its business that forbids it.

Corporations, like individuals, may borrow money for the conduct of their affairs, without express authority therefor, whenever the nature of their business may render it proper or expedient. And the power to borrow carries with it very generally, unless expressly restrained, the power to secure the loan by mortgage. If there is no such express power found in the charter of a corporation, but power is conferred on its directors to make all necessary contracts, and to sell or otherwise dispose of any portion of its property whenever in their judgment, it should be found to be to the interest of the company, the exercise of the power to borrow and to secure the loan by mortgage from the company would be valid.

In equity, where it appears that while a transaction was made to assume the form of an absolute bill of sale, it was in substance, and according to the understanding and intent of the parties, a mere loan of money, and that the instrument taken, being an absolute bill of sale, was but as security, and therefore a mortgage, any evidence, whether written or oral, tending to show that the transaction was really one of security is admissible, not for the purpose of contradicting the terms of the instrument, but of raising an equity paramount to the mere form of the instrument.

APPEAL from the Circuit Court of Baltimore City.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., MILLER, ALVEY and IRVING, J.

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*R. W. Baldwin, Geo. Hawkins Williams and S. Teackle Wallis*, for the appellants.

If the averments of the bill of the appellants can be maintained, there is no doubt of their right to relief. The proceeding is on the part of the principal stockholders of the Powhatan Company, suing not only for themselves but for all other stockholders who may come in. It is not only against certain parties who are still directors of that company and of the Bay Line Company, but against both of the said corporations. It charges fraud and conspiracy, as well as breach of trust, on the part of certain of the directors of the Powhatan Company, and imputes the same to the Bay Line Company itself, which really sat at the board of the Powhatan Company in the persons of its own directors, representing stock of the latter company, purchased by the Bay Line for the express purpose. It alleges the control exercised by the Bay Line directors over the Powhatan Company, as precluding all action on the part of the latter corporation to vindicate the rights of its shareholders and redress their wrongs. Under these allegations it is assumed that the right of the shareholders to seek relief in equity, in their own names and behalf, cannot be successfully disputed.

Nor is it necessary to the relief prayed that either a conspiracy or confederacy, *ab initio*, should be established, or that actual personal fraud should be made out. Directors of corporations are trustees for shareholders and creditors. *Jackson vs. Ludeling*, 21 *Wal.*, 624.

They have the duties and liabilities, and are subject to the obligations and responsibilities which attach to fiduciaries generally. For any wilful dereliction of duty, or gross negligence or inattention to duty, amounting to a breach of trust, they are as fully liable as for actual, intentional fraud. *Dodge vs. Wolsey*, 18 *Howard*, 341; *Peabody vs. Flint*, 6 *Allen*, 56; *Hodges vs. N. E. Screw Co.*, 1 *Rhode I.*, 341; *Salmon vs. Richardson*, 30 *Conn.*, 573; *Field*

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on Corporations, secs. 141, 399, 400, and notes, pages 424, 425, 427; *Gray vs. Lewis*, 8 *Equity*, (L. R.) 526; *Sperling's Appeal*, 71 *Pa.*, 11; *Scott vs. Depeyster*, 1 *Edw. Chy.*, 513; and see *Green's Brice's Ultra Vires*, (2nd *Am. Ed.*) 477, and notes, 484 to 486, and notes; *Robinson vs. Smith*, 3 *Paige*, 233; *Brewer vs. Bost. Theatre*, 104 *Mass.*, 387. *A fortiori* is this the case, where acts *ultra vires* are contemplated or have been committed. *Heath vs. Erie Railway Co.*, 8 *Blatchf.*, 406; *Pond vs. Vermont Valley R. R.*, 12 *Blatchf.*, 280.

And wherever equity would have prevented an act *ultra vires*, by injunction, it will grant relief after the act has been done. *Gregory vs. Patchett*, 33 *Beavan*, 607.

Being fiduciaries, directors in corporations can no more represent opposing or conflicting interests, or occupy double and inconsistent capacities, in relation to the subject-matter of the trust, than any other trustees. Whenever they do so; whenever they represent their own interests or those of others, in performing their duties or exercising their functions as directors, they subject their acts to the most rigid scrutiny, and assume the burden of establishing their legality by affirmative proof. Such acts at best are voidable. It is not a question of actual fraud merely, but of public policy, founded on the facility for fraud, and the temptation to it, which such divided interests and opportunities afford. *Md. Fire Ins. Co. vs. Dalrymple*, 25 *Md.*, 266; *Schwartz vs. Yearley*, 31 *Md.*, 270, 278; *Parish vs. Cumb. Coal & I. Co.*, 42 *Md.*, 605 to 607; *Abbott vs. Am. Hardware Co.*, 33 *Barb.*, 578, 593, 594.

Directors cannot vote, nor can stockholders, when personally interested. *Butts vs. Wood*, 37 *New York*, 319; *Atwood vs. Merryweather*, L. R., 5 *Equity*, 464 *n.*

Where they are directors of and interested in two corporations, they cannot make or participate in the making of contracts between the two. *Polar Star Lodge vs. Same*, 16 *La. Ann.*, 70; *Abbott vs. American Hard Rubber Co.*,



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33 Barb., 578, 593, 594; *St. James Church vs. Church of Redeemer*, 45 Barb., 356; *San Diego vs. S. D. R. R.*, 44 Cal., 113; *Green's Brice's Ultra Vires*, 479a, (2nd Am. Ed.); *Field on Corporations*, sec. 175.

Whatever disability, in these regards, would attach to the directors of the Bay Line Company, who became directors in the Powhatan Company, would attach to the Bay Line itself, which in fact was the purchaser and owner of the Powhatan stock, and sat, in the persons (as has already been said) of its directors, at the board of the Powhatan Company. The Bay Line Company, thus practically and substantially a director of the Powhatan Company, became *ipso facto* a fiduciary, in its corporate capacity, and its acts, in all matters in which it represented its own interests or which involved those interests, at the board of the Powhatan Company, were *prima facie* fraudulent in law, and impose the *onus* on the Bay Line Company, of establishing their *bona fides* and validity. When the Bay Line Company bought stock in the Powhatan Company, and its directors went into the latter company, to control it, with the full knowledge of an existing rivalry, or a conflict of interests, already arisen or likely to arise, between the Powhatan Company and the Bay Line, or the other affiliated corporations with which the Bay Line, or its directors or corporators, were connected in business or interest—they deliberately and wilfully placed themselves in a false position. They were bound to know that they could not serve two masters, or do their duty equally to two antagonists. They purposely did what the law forbids. They undertook not only to act with *uberrima fides*, but to prove that they so acted. They subjected themselves to all the temptations and risks which their false and forbidden position involved in fact, and all the adverse presumptions and personal responsibilities which the law attaches to it. Their very act, in assuming such a position, was in itself an illegal confederacy, in contemplation of equity.

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Corporations cannot purchase stock in other corporations, unless expressly authorized by law to do so. *Mutual S. Bank vs. Meriden Co.*, 24 Conn., 159; *Berry vs. Yates*, 24 Barb., 210; *E. A. B. Co. vs. E. C. R. W. Co.*, 73 E. C. L., 810; *Central R. W. Co. vs. Collins*, 40 Georgia, 628, 43 Georgia, 57; *Sumner vs. Marcy, Woodb. & Min.*, 111; *Dandridge vs. Penn. S. N. Co.*, 8 Gill & J., 319; *Weckler vs. 1st Natl. Bank*, 42 Md., 590, 591; *Green's Brice's Ultra Vires*, 91 n. b., (2nd Ed.)

Nor can they consolidate or amalgamate themselves with other corporations, without express lawful authority. *Pearse vs. Mad. & Ind. B. R. Co.*, 21 Howard, 441; *Field on Corporations*, secs. 426, 427.

This latter disability cannot be got rid of or circumvented, by one corporation's buying up the stock of another, and practically administering or governing it. The evil which forbids an authorized consolidation, is the danger that a corporation, chartered for one purpose, may by that process exercise the whole chartered power of another and a different one. A railroad company, forbidden by its charter to exercise banking powers, might exercise them, nevertheless, to the utmost and most dangerous extent, by buying up the stock of a bank. Monopolies, of the most hurtful sort, might in the same way be set up and consolidated, to the destruction of large public interests, and yet often without the public knowledge or suspicion. The law will not tolerate so plain an evasion of a beneficial principle.

Neither a corporation nor a majority of the corporators can lawfully use their power to the injury of the minority. *Green's Brice's Ultra Vires*, (2nd Ed.) 683; *Brewer vs. Boston Theatre*, 104 Mass., 395, 396; *Menier vs. Hooper's Teleg. Works*, 9 Chy. App. L. R., 350.

The transaction which took the shape of a purchase of the Steamer Petersburg, from the Powhatan Company, was in law as well as substance and fact, a loan of money

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upon the security of that steamer. *Dougherty vs. McColgan*, 6 G. & J., 280, 281; *Baughers vs. Merriman*, 32 Md., 192; *Pugh vs. Davis*, 6 Otto, 336; *Russell vs. Southard*, 12 How., 148, 151, 152.

Whether a loan or a purchase, it was in every point of view, a scandalous transaction, and especially when it is borne in mind that the parties to it, being fiduciaries, acted in the double capacity of buyers and sellers, or lenders or borrowers, as the case may be. A Court of equity will strip it of all disguises, and treat it as an act of simple spoliation, to which no color of validity can be given by its solemnity or its form.

*Randolph Barton* and *L. Nevett Steele*, for the appellees.

The principles of law governing this case are simple. The duties and obligations of directors in corporations, to the stockholders they represent, have been likened to the duties of trustees to their *cestuis que trust*. This undoubtedly is the doctrine in this State as laid down in the case of *The Hoffman Steam Coal Company vs. The Cumberland Coal and Iron Company*, 16 Md., 456. But no case is to be found imposing upon such officers a greater obligation than to direct and manage the interests confided to them, in a manner which honestly accords with their best judgment—unerring judgment is not expected of them. Infallibility is never looked for. Blunders of the grossest sort are readily tolerated, if they can be attributed to anything short of *fraud*. It is fraud alone that will render directors personally responsible.

The only issues in this case are :

1st. Were the defendants guilty of *fraud* in their connection with the Powhatan Company?

2nd. Was the transaction of the "Petersburg" a *sale* of that property, or was it a mortgage?

The following citations would seem to settle the law governing the first question :

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“But although directors may be liable and required to indemnify parties injured on account of their fraud and abuse of trust, they cannot be held personally responsible where the injury is the result of mere misjudgment or only unwise, extravagant, improvident, slightly negligent, or a simple error in the performance of their duties. The only effectual remedy in such cases is to change the Board and thereby the management of the corporate officers.” *Field on Corporations*, 186.

“It should be observed however that though loss accrue to the funds of an incorporated company, through a mere error on the part of the directors, though it be in a matter of law, they are not personally liable, unless there has been negligence or fraud. The remedy in case of loss by misjudgment merely, is to be found, not in the Courts, but in the corporation itself; in its power by new elections to confide its interest to other managers. No man who takes upon himself an office of trust or confidence for another, or for the public, contracts for any thing more than a diligent attention to its concerns, and a faithful discharge of its duties. He is not supposed to have attained infallibility, and does not therefore stipulate that he is free from error. In order to subject him, the error must be so gross as to warrant the imputation of fraud, or at least, must indicate a want of the usual and necessary knowledge for the performance of the duty assumed by him in accepting the office or agency.” *Angell and Ames on Corporations*, (10th Ed.,) sec. 314.

In *Sperling's Appeal*, 71 Pa. St. R., 24, SHARSWOOD, J., after reviewing the leading cases in England<sup>1</sup> and America, concludes as follows: “It seems unnecessary to pursue this investigation any further. These citations, which might be multiplied, establish as it seems to me, that while directors are personally responsible to the stockholders for any losses resulting from fraud, embezzlement or wilful misconduct, or breach of trust, for their own benefit, and not

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for the benefit of the stockholders, for gross inattention and negligence by which such fraud or misconduct has been perpetrated by agents, officers or co-directors, yet they are not liable for mistakes of judgment, even though they may be so gross as to appear to us absurd and ridiculous, provided they are honest, and provided they are fairly within the scope of the powers and discretion confided to the managing body." See *Godbold vs. The Branch Bank of Mobile*, 11 Ala., 199.

ALVEY, J., delivered the opinion of the Court.

The bill in this case was filed on the 7th of August, 1875, by certain persons as shareholders of the stock of the Powhatan Steamboat Company, a corporation formed under the act of the Legislature of 1840, ch. 167, against the defendants, some of whom were directors in the company, for the purpose of obtaining redress for what is alleged to have been their loss in the value of their shares of stock, by reason of certain wilful and fraudulent mismanagement of the affairs of the corporation, to accomplish objects and purposes adverse to the interest of the shareholders of the stock of the company.

By the charter, the company was clothed with power to provide itself with all necessary steamboats, and other equipments, "to navigate the Chesapeake bay and its tributary streams, for the conveyance of passengers, towing of ships, vessels, rafts or arks, and the transportation of merchandise or other articles." The affairs of the company were required to be managed by a president and board of directors to consist of six persons, to be chosen from the stockholders, the president to be one of the six directors; and a *majority* of the directors, at all meetings, to have power to act as if all were present. The power given by the charter to the board of directors, was very large and comprehensive. It authorized them not only to employ all necessary agents, to make contracts, to buy property both

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real and personal, for the purposes of the company, to build or purchase all such boats as they should deem necessary, etc., but the same, or any part thereof, *to sell or otherwise dispose of*, when, in their judgment, it should be to the interest of the company that it should be done. The directors, or the stockholders holding a majority of the stock, were authorized to call a general meeting of stockholders; "and a majority of the stock represented at said meetings, shall have the power of closing and winding up the concerns of said company."

Before this company had been incorporated, the Baltimore Steam Packet Company had been incorporated by the Act of the Legislature of 1839, ch. 328; and the object of that company was to provide the necessary steamboats and equipment, "to navigate the Chesapeake bay and its tributary streams, or to navigate the Atlantic coast, or any of the bays or rivers emptying into the Atlantic Ocean; and to connect thereto boats, vessels, stages, or other carriages, for the conveyance of passengers, towing of ships, vessels, rafts, or arks, and the transportation of merchandise or other articles." The board of directors is required to consist of eight persons, to be chosen from the stockholders, and the president of the board to be one of the directors. The provisions of the charter, and the powers of the board of directors, are substantially, and almost literally, the same as those contained in the charter of the Powhatan Steamboat Company.

Both companies were organized and operated for several years prior to the late civil war; but the war suspended the operations of both companies. After the close of the war, the Steam Packet Company resumed operations, and the Powhatan Company reorganized, by the purchase of several second-hand steamers for stock of the company, at rates considerably in excess of the prices of the steamers to those disposing of them to the company. The routes of the two companies were not at all in conflict the one

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with the other. The route of the Steam Packet Company was between the City of Baltimore, Maryland, and the City of Norfolk, in the State of Virginia; and the main route or line of the Powhatan Company was from Baltimore to Richmond, by way of the Chesapeake bay and James river; with a light draught boat plying on the Appomattox river, between Petersburg and City Point, on the James river, as a branch line. The Powhatan Company, after its reorganization, established a subsidiary route or line, from Baltimore to Richmond, by way of the York river, connecting at West Point, on said river, with the Richmond and York River Railroad, running to and from the latter named city, and thus forming a through line from Richmond to Baltimore.

These were the routes of the two steamboat companies, and there had been no serious conflict or competition between them prior to the fall of the year 1870; but there had been considerable competition between the Powhatan Company and the Richmond, Fredericksburg and Potomac Railroad Company, running from Richmond to Acquia creek, and from the latter point by steamers, by way of the lower Potomac and the Chesapeake bay, to Baltimore City. The Powhatan Company had also encountered strong competition on its York river line, and was compelled to buy off the steamers engaged in the opposition.

In the latter part of November, in the year 1870, the Steam Packet Company became the purchasers of 1108 shares of the capital stock of the Powhatan Company, at \$40 per share, the par value being \$100 per share. This quantity of stock was about one-third of all then issued by the company. And, according to arrangement, this stock thus purchased was transferred to the names of Jno. M. Robinson and Samuel M. Shoemaker, two of the directors in the Steam Packet Company; and thereupon, two of the directors in the Powhatan Company, namely, Messrs. Lehr and O'Donnell, retired, and Robinson and

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Shoemaker were elected in their stead. Robinson was also, at the time, and continued to be, stockholder and president of the Seaboard and Roanoke Railroad Company, whose road runs from Norfolk, Va., to Weldon, in North Carolina, and of the Richmond, Fredericksburg and Potomac Railroad Company, and in the latter of which Shoemaker was also stockholder and director; and all of which companies are alleged to have been, more or less, competitors in trade with the Powhatan Company.

The bill charges, that Robinson and Shoemaker, having obtained admission into the Powhatan Company, acted not for the promotion of the interest and welfare of the stockholders of that company, as they were in duty bound to do, but that they acted "on their own behalf and for their own interest, as well as in behalf and for the interest of others owning and controlling together with themselves, a majority of the stock of said three confederating companies, *unlawfully and covinously combined together*, to cripple, embarrass, and destroy the said Powhatan Steamboat Company, so as to secure to the said Baltimore Steam Packet Company, and its said confederates, or such other companies as it might choose, a monopoly of the said routes of the said Powhatan Steamboat Company;" and that it was with that view and purpose that they purchased on behalf of the Steam Packet Company the 1108 shares of stock, and procured themselves to be elected directors in the Powhatan Company; and from that time they continued their plans and contrivances for the ruin of the Powhatan Company, and finally brought it to total wreck, in the winter of 1875, by declaring it insolvent and thenceforth unable to proceed with its business. There are various acts and transactions charged as means resorted to to bring about the result. It is charged that through the contrivance of Robinson and Shoemaker, the better to obtain complete control over the Powhatan Company, they being directors in both companies, the



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Steam Packet Company was induced to loan to the former company a large sum of money, *without corporate authority for so doing*, and to take a bill of sale, absolute in form, of the Petersburg, one of the best steamers of the Powhatan Company, as security for such loan; and which steamer was ultimately taken and appropriated by the Steam Packet Company. It is also alleged that they, with an intent to cripple the company, and to frustrate its prospects, refused to enter into an arrangement with parties owning and representing the Richmond and York River Railroad Company, in the spring of 1873, for the running a daily line of steamers, in connection with the railroad, between Baltimore and Richmond, by way of the York river, and that by reason of such refusal to make such connection, other steamers were placed upon the line, and strong competition brought about, resulting in ruinous loss of business and profit to the Powhatan Company. It is further alleged, that by the wilful mismanagement of the property of the company, great wrong was done and loss sustained. As an instance of such mismanagement, the surrender of one wharf and the renting another at a larger rent, less available to the requirements of the company, at Richmond, is specified; also the refusal to repair the steamers of the company, and the allowing them to remain idle, while steamers of the Steam Packet Company were being chartered by the Powhatan Company for daily use; and finally the buying up a majority of all the stock of the Powhatan Company in order to get entire and complete control of the affairs of the company, for sinister and fraudulent purposes; are charged as so many distinct breaches of duty, all having for their object, and tending to the accomplishment of, the complete ruin of the company; and that, by such means, the ruin of the company was in fact finally accomplished.

The answers of the defendants, Moncure Robinson, John M. Robinson and Samuel M. Shoemaker, Thomas

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Kelso, the Baltimore Steam Packet Company, and the Powhatan Company, strongly controvert many of the most material facts alleged in the bill, and utterly deny all charges of fraud, gross negligence, or intentional mismanagement of the affairs of the company by the board of directors, so far as the defendants were concerned; and aver and insist that the misfortunes, and disastrous termination of the operations of the company, were owing exclusively to the inherent weakness of the company itself;—its poor and insufficient equipment, and its want of sufficient capital to enable it to carry on its operations successfully.

Jacob Brandt, a former director and president of the company, is also a defendant, and he filed a separate answer to the bill, in which he admits most of the material facts charged; and he was afterwards examined as a witness for the plaintiffs.

There has been a very large mass of evidence produced, documentary as well as oral testimony of witnesses; but before making special reference to this evidence, it is proper that we should state the general principles of law that would seem to be applicable, and which must govern in the determination of the case.

The first question is, as to the power of the Steam Packet Company to purchase and hold the stock of the Powhatan Company. This, it is contended by the plaintiffs, could not be done without express authority by law. But, while some Courts have so held, the great weight of authority is the other way. There is nothing in the charter of the Steam Packet Company, or in the nature of its business, that would, in the slightest manner, forbid the exercise of such power; and having money to loan or invest, there would appear to be no good reason why it might not invest in the stock of other corporations as well as in any other funds, provided it be done *bona fide*, and with no sinister or unlawful purpose. The Courts of

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England, at one time, strongly opposed the right of one corporation to deal or invest in the stock of another corporation without express authority for so doing; but that opposition has been entirely overcome, and it is now settled there, that one corporation may deal in the shares of another, without express authority so to do, unless where expressly prohibited, or the nature of its business render it improper so to deal. *Re Barned's Bank*, L. R., 3 Ch., 105; *Re Asiatic Banking Co.*, L. R. 4 Ch., 252. In the latter of the cases just cited, Lord Justice SELWYN, in speaking of this power of corporations, said,—“As to the capacity of a trading corporation to accept shares in another trading corporation, it is sufficient for me to say that I entirely agree with the judgment of Lord CAIRNS, in the case of *Barned's Banking Company*, viz., that there is not, either by the common or statute law, anything to prohibit one trading corporation from taking or accepting shares in another trading corporation. There may, of course, be circumstances which prohibit or render it improper for a company so to do, having regard to its own constitution, as defined by its memorandum and articles.” It is in accordance with this statement, that the law is laid down as settled, by Brice, in his work on *Ultra Vires*, pp. 91, 92. And in this State, the same principle has been fully sanctioned in the case of *Elysiville Manf. Co. vs. Okisko Co.*, 1 Md. Ch. Dec., 392, and same case affirmed on appeal, in 5 Md., 152. Here, the stock that was purchased on account of the Steam Packet Company was transferred to the names of Robinson and Shoemaker, who held it as trustees for the benefit of the Steam Packet Company; and being thus qualified, they were legally eligible as directors in the Powhatan Company. The fact of their being directors of the Steam Packet Company in no way disqualified them from also being directors of the Powhatan Company. But if there have been as alleged, illegality or impropriety in their acts and proceedings in

the management of the affairs of the latter named company, such acts and proceedings are subject to different considerations.

It is also alleged and insisted that the \$40,000 advanced or loaned by the Steam Packet Company to the Powhatan Company, upon what is alleged to be the security of the steamer Petersburg, was unauthorized by any power contained in its charter; and, upon the principle now perfectly well settled, that a body incorporated for special purposes cannot devote any part of its funds to objects unauthorized by the terms of its charter, it is contended that such contract for loan or advancement was therefore void. But whether we regard this transaction as being strictly within the powers of the Steam Packet Company, or otherwise, the legal result, so far as the stockholders of the Powhatan Company are concerned, must be the same. If the transaction be treated as a sale and purchase of the steamer, as contended by the defendants, there can be no question as to the existence of ample power; for the charters of both the Steam Packet Company and the Powhatan Company confer express authority to purchase and sell steamers: If, however, the transaction be treated as a loan, secured by mortgage, even conceding that there could be a question of the power of the Steam Packet Company to make such a loan of its funds, the contract being an *executed* one, that question of power could not be raised on a proceeding like the present. Moreover, in such case, where the parties complaining have received the consideration of the contract, in other respects just and equitable, there is no principle upon which a Court of equity could be induced to interfere upon the mere ground of the want of authority in the adverse party. *Elysville Manf. Co. vs. Okisko Co.*, 5 Md., 152; *National Bank vs. Matthews*, 98 U. S., 621, 628; *Silver Lake Bank vs. North*, 4 John. Ch., 370. And the same considerations apply to all the mortgages made by the Powhatan Company to the Steam Packet Company.

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With respect to the power of the Powhatan Company to borrow money and secure the same by mortgage of its property, we can entertain no doubt. It is true there is no such express power found in its charter; but power is conferred upon its board of directors to make all necessary contracts, and to sell or otherwise dispose of any portion of its property, whenever in the judgment of the directors it should be found to be to the interest of the company. This would seem to be comprehensive enough. But, independently of this, it is now well settled, that corporations, like individuals, may borrow money for the conduct of their affairs, without express authority therefor, whenever the nature of their business may render it proper or expedient. And the power to borrow carries with it very generally, unless expressly restrained, the power to secure the loan by mortgage. *Susquehanna Bridge Co. vs. Ins. Co.*, 3 Md., 305; *Australian Steamship Co. vs. Mounsey*, 4 K. & J., 733; *Green's Brice's Ultra Vires*, pp. 213 to 225, and the cases there cited. Whether the power was properly exercised in this case, or whether it was exercised as a means to accomplish a forbidden and unlawful purpose, as alleged by the plaintiffs, is a question altogether aside from the question of the existence of the power.

Seeing, then, that the case presents no question of *ultra vires* in the transactions referred to, the next question is, upon what principle or doctrine are the defendants in this case to be held responsible to the plaintiffs for losses alleged to have been sustained by them, in the management of the affairs of the corporation?

Directors in joint stock corporations are not, in the strict and technical sense of the term, trustees for the stockholders. The property of the corporation is not vested in them, but in the body corporate. They are, however, in one sense, trustees, and they occupy a fiduciary relation to the corporation and its stockholders.

They are entrusted with powers which are to be exercised for the common and general interest of the corporation, and not for their own private individual benefit. The confidence reposed in them, and the position they occupy towards the corporation and its stockholders, require a strict and faithful discharge of duty, and they are not allowed to derive from their position, either directly or indirectly, any profit or advantage whatever, except it be with the full knowledge and concurrence of the company, represented by others than themselves. And if this relation and duty be violated, to the injury of the corporation or its stockholders, the law affords an ample redress for the wrong against the guilty parties.

In the English Courts, the case of the *Charitable Corporation vs. Sutton*, 2 *Atk.*, 400, decided in 1742, is the first that occurs in which the liability of the directors to the corporation for breaches of duty amounting to breaches of trust, is fully and accurately defined. In that case, Lord HARDWICKE, in defining the degree of care and fidelity required of a director, and for what nature of default he may be liable, referred to the doctrine of the civil law upon the subject. By that law it is declared that "those who are named by companies and corporations to have the direction of their affairs, are obliged to the same care and diligence as factors or agents. And they are answerable, not only for any fraud and gross negligence which they may be guilty of, but also for all faults that are contrary to the care required of them." 1 *Domat*, 2 *b. tit.* 3, *sec.* 2, *Art.* 1. And in that case of *Sutton*, the Lord Chancellor held, that directors of a corporation are liable in equity to the corporation, not only for gross frauds and breaches of trust, whereby the assets of the corporation are wasted, but are also liable to the corporation, if the assets of the corporation have been wasted by negligence on their part so gross as to amount to a breach of trust. This is the leading case upon the subject, and in which the law is as

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strongly laid down as in any subsequent case. The case of *Spering's Appeal*, 71 Penn. St., 11, where the decisions are carefully examined, does not carry the doctrine further than the case of the *Charitable Corporation vs. Sutton*, nor does any other case to which we have been referred. They all concur in holding that, in equity, the directors are personally liable for the consequences of their frauds or malfeasance, or for such gross negligence as may amount to a breach of trust, to the damage of the corporation or its stockholders.

In the case of *Overend, Gurney & Co. vs. Gurney*, L. R., 4 Ch., 701, and the same case on appeal, reported as *Overend, Gurney & Co. vs. Gibb*, L. R., 5 H. L., 480, where the question was most elaborately discussed in respect to the negligence of directors, it was held, that facts which may show *imprudence* in the exercise of powers clearly conferred upon directors will not subject them to personal responsibility; but if the imprudence be so great and manifest as to amount to *crassa negligentia*, and consequently a breach of trust, personal responsibility will be incurred. Indeed, all the cases agree that directors are not liable for the consequences of unwise or indiscreet management, if their conduct is entirely due to mere default or mistakes of judgment. And the *onus* of proof of fraud, combination, or gross negligence, to render the directors personally liable, is upon the party making the charge; and the proof must be clear and manifest. *Turquand vs. Marshall*, L. R., 4 Ch., 376; *Overend, Gurney & Co. vs. Gibb*, L. R., 5 H. L., 480; *Hodges vs. New England Screw Co.*, 1 R. I., 312.

In these cases, the proper and primary party to complain and call the directors to an account, in a Court of equity, for fraud or breaches of trust, in the management of the affairs of the corporation, is the corporation itself; because the duty is owing, and the wrong is done directly to the corporation, and only indirectly to the shareholders.

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And therefore to enable a shareholder, either for himself alone, or for himself and others, to maintain a bill against directors for such fraud or breaches of trust, he must allege and show, not only the violations of duty or breaches of trust on the part of the directors, but that he as stockholder has been damnified thereby, and that the corporation has failed or refused to take the proper legal steps for the redress of the wrong. *Dodge vs. Woolsey*, 18 How., 331; *Memphis vs. Dean*, 8 Wall., 73; *Robinson vs. Smith*, 3 Paige, 222; *Greaves vs. Gouge*, 69 N. Y., 154; *Peabody vs. Flint*, 6 Allen, 52; *Brewer vs. Boston Theatre*, 104 Mass., 378; *Foss vs. Harbottle*, 2 Hare, 461; *Thompson on Liability of Directors*, 385. But, in this case, if the allegations of the bill are sustained by proof, that a majority of the shares are owned by the Steam Packet Company, and that a majority of the directors are adverse to the interest of the plaintiffs, and are combined against them, and would, by means of the control that they exercise, frustrate and defeat any attempt to induce the corporation to take action for the redress of the wrongs alleged; such facts would be a sufficient excuse for not making or alleging a formal demand upon the corporation to take action. *Menier vs. Hooper Tel. Works*, L. R., 9 Ch., 350; *Mason vs. Harris*, 11 Ch. Div., 97; *Heath vs. Erie R. Co.*, 8 Blatchf., 347; *Thompson, Liab. Directors*, 385, 392. The Powhatan Company is made defendant as well as the Steam Packet Company, and that, in a case like the present, would seem to be essential. *Robinson vs. Smith*, 3 Paige, 222.

In this case, the fact that Robinson and Shoemaker were stockholders and directors in the Steam Packet Company, as well as in the Powhatan Company, and participated in the transactions between the two companies, with certain interest in other companies, supposed to be interested, would seem to constitute the main foundation for the principal charges of the bill. And if



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it be true, as charged by the plaintiffs, that the two defendants, Robinson and Shoemaker, acting for and in behalf of the Steam Packet Company, did purchase the stock in the Powhatan Company, and procure themselves to be elected directors therein, for the purpose of getting control of the management of that corporation, and by that means to make it subservient to the interest of rival companies, or with the design of making insolvent and utterly breaking down the corporation altogether, and thus getting rid of competition, no more flagrant fraud could be perpetrated; and there can be no question but that for all loss to the company or its stockholders, resulting from the carrying out of such device or contrivance, the guilty parties should be held responsible to the fullest extent allowed by the law. Not only would there be incurred a personal responsibility by the directors or agents participating in the wrong, but, if such a scheme were devised and executed at the instance and on behalf of another corporation, deriving its powers and franchises from the State, such conduct would be a fraud upon the State; and in addition to incurring civil liability for the injury done, such conduct would subject the offending corporation to the penalties of misuser or abuser of its franchises. A corporation cannot be allowed to do indirectly and covertly, what it is not authorized to do directly and openly. And whenever such an attempt is made, the Courts can neither be too emphatic in condemning the act, nor too ready to afford the strongest remedy allowed by the law for the prevention or redress of the wrong.

Such is the law as applicable to the case as stated in the bill. But if, upon the proof, there is a failure to establish the fraudulent design or purpose alleged to have characterized the various acts and transactions done and instigated by the two directors named, the whole foundation of the case fails. For, as we have seen, mere indiscretion, want of skill or foresight, or mistakes of judg-

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ment, in the conduct of the affairs of the corporation, afford no ground of personal liability on the part of the directors.

And upon the question of the fraudulent intent or design charged, though it be true that these two directors represented both corporations,—in the one, being two of a board of eight directors, and in the other, two of a board of six directors,—this fact alone, while it should subject their conduct to rigid scrutiny by the Court, does not afford ground of presumption against the legality and fairness of the dealings and transactions between the two companies. The two companies were certainly competent to contract the one with the other; and the two directors whose conduct is in question were interested in both companies, and by their relation to and official positions in them, they owed duties, and were bound to be faithful alike, to both. Therefore, while acting within the scope of the powers delegated to them by the stockholders of the corporation, there is no presumption of illegality or unfairness in their dealings and transactions as between the two companies. They were the chosen agents of both; and to be successful in any attempt to impeach the validity of their acts, with a view of making them personally responsible either to the corporation or to the stockholders, there must be distinct charges of misconduct, fully supported by proof. *Adams Mining Co. vs. Senter*, 26 Mich., 73; *U. S. Rolling Stock Co. vs. Atlantic & Great Western R. Co.*, 34 Oh. St., 450.

This case is altogether unlike that of a trustee, agent, or director, bargaining in a matter of personal advantage to himself individually, with the party reposing the confidence in him, and where it is incumbent upon him to show that a fair and reasonable use has been made of that confidence; as in the cases of the *Hoffman Steam Coal Co. vs. Cumblld. Coal & Iron Co.*, 16 Md., 456; *Cumblld. Coal & Iron Co. vs. Parish*, 42 Md., 598; *Jackson vs. Ludeling*,

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21 *Wall.*, 616, and other cases of that class to which reference might be made. In that class of cases the law proceeds upon the principle of constructive fraud, irrespective of fraud in fact, and hence the *onus* of proof is upon the party seeking to maintain the transaction. But in a case like the present, where the effort is to make the defendants personally liable for alleged injuries occasioned by conduct wilfully fraudulent, in intent and purpose, amounting to breaches of trust, the proof in support of the allegations must be other than mere constructive fraud or breaches of trust;—there must be affirmative proof of the misconduct charged, going to establish the fraud in fact.

Such being the requirement of the case, the motive and intent with which the various acts were done, or left undone, by the directors, and charged as fraudulent, become most material.

It has been argued, that Robinson and Shoemaker, being stockholders and directors in the Steam Packet Company, and bearing the same relation to other companies mentioned, designed and intended from the commencement of the connection between the Steam Packet Company and the Powhatan Company, to wreck and bring to utter ruin the latter company: That their object in getting the stock in the latter company was either to cripple and bring it to ruin, or to make it entirely subservient to the interest of the other companies in which they were interested. But, upon careful examination of the evidence, we do not think that the facts proved warrant that conclusion.

The proof clearly shows that the Powhatan Company as re-organized was never strong either in equipment or finances. The steamers owned by it were bought up after the war in rather a worn condition, and required considerable repair. They were placed in the company after being repaired, for stock, at an exaggerated valuation. The com-

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pany seems to have been without surplus or even the necessary working capital; and after operating for five years without profit, with a sharp competition, one of the steamers at least had become dilapidated and required repair, and the company was without the necessary means to pay the cost. That the management was bad admits of no doubt. The books of the company were not regularly kept, and did not show its real condition. There were no funds on hand, and there was not even a bank account kept. Dividends had been declared when there were no profits out of which to pay them. All agree that the company was largely in debt, and was financially embarrassed; and that this was its condition when Robinson and Shoemaker became connected with it about the close of the year 1870.

In this state of things, one would naturally suppose, if the ruin and utter destruction of the business prospects of the company were the results desired to be accomplished, instead of investing a large sum of money in its stock, furnishing aid by the loan of money, and by a change in its management, bringing about partial success in its operations, so as to enable it, to a considerable extent, to pay off its prior indebtedness, Robinson and Shoemaker would have counselled the Steam Packet Company to stand aloof, refuse all aid, and to offer no obstacle to the ruin that seemed to be approaching the Powhatan Company. But such was not the course pursued.

Whether Robinson and Shoemaker sought to become interested in the company on behalf of the Steam Packet Company, or whether they were invited and urged to that course by those representing the Powhatan Company, is a question upon which there is a conflict of testimony. But the undisputed facts of the case would rather indicate that their introduction into the company was desired on the part of the directors and those interested in the welfare of the company; for otherwise it is difficult to con-

ceive how they obtained admission. It was well understood, as a *sine qua non* to the Steam Packet Company's becoming interested, that it was to get at least one-third of the stock of the Powhatan Company, so as to be entitled to two directors; and the price of the stock; who should sell out, or sell such proportion of his shares as should be necessary; and which of the then board of directors should retire to make place for the two new directors; were questions that were fully discussed, and assented to by all concerned. The price of the stock first demanded was \$90 per share; but the parties subsequently fell to \$40 per share, and at that price sold to the Steam Packet Company 1108 shares, being the one-third of the whole amount of stock that had been issued by the company. These circumstances not only show the desire on the part of those representing the Powhatan Company for the admission of those representing the interest of the Steam Packet Company, but they strongly indicate to what straitened condition the former company was reduced, and the estimate of its worth and credit. The Steam Packet Company having purchased the 1108 shares of stock at a cost of \$44,320, it was but rational and prudent that it should have insisted upon having two directors in the board of direction, especially in view of the previous management of the affairs of the company. From this time to the summer of 1873, the company seems to have had considerable prosperity, making profit, and reducing to a considerable extent its former indebtedness.

It is also argued, that the fact that the Steam Packet Company advanced money, and took bills of sale or mortgages of the steamers of the Powhatan Company, is proof of the design or intention to get entire control of the property of the latter company, and thus to destroy its ability to carry on its operations. But we think no such conclusion can fairly be drawn from that fact, either stand-

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ing alone or taken in connection with the other facts of the case. It was one of the first things that occurred, after the election of Robinson and Shoemaker as directors, that they were requested to become instrumental in procuring a loan of \$40,000 from the Steam Packet Company. This transaction does not appear to have been at all at their instigation, but was suggested and urged by the other directors. The \$40,000 were obtained, and the only security the Powhatan Company had to give, or could give, was a bill of sale or mortgage of one of its steamers. In this we discover nothing that can be fairly construed into a purpose to work harm or destruction to the borrowing company. And so with the other loans made. They were all sought and obtained to relieve pressing demands that the Powhatan Company could not otherwise meet. And the fact that the money was attempted to be secured by mortgages on the steamers of the latter company, affords no ground for the argument attempted to be supported from this part of the case.

Down to the spring or summer of 1873, there was entire harmony among the directors, and a full concurrence in all the proceedings of the company. There was no complaint, or objection made from any quarter. Robinson and Shoemaker had been elected and re-elected without opposition; and it does not appear that it had ever been suggested that they had acted, or attempted to act, since being directors, in a manner hostile to the interest of the company, or that they were in any way sacrificing the interest of the company to rival companies in which they were interested. Indeed, being but two in a board of six, they were powerless for any such purpose, even if they had been disposed to such course. It was not until May, 1873, after Clyde had obtained control of the Richmond and York River Railroad, and had come forward with his project of a daily line instead of a tri-weekly line, between Baltimore and Richmond,

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by way of the York river, to be run by the Powhatan Company in connection with his road, that the trouble commenced. But whether it would have been more judicious to accept than to reject the proposition of Clyde, is not the question that we have to decide. It may be conceded, for the sake of the argument, that it would have been better for the Powhatan Company if the proposition of Clyde had been adopted. It seems to be quite certain that the disastrous fate of the company was greatly accelerated by the opposition line run by Clyde and his associates on the York river route, in consequence of the failure of the Powhatan Company to accede to the proposition to run the daily line. But the question is, was it by means of the acts and conduct of the defendants that the proposition to run the daily line was rejected, and if so, were they actuated in the matter by motives and with the design of doing wrong, and bringing loss and disaster to the Powhatan Company?

In their answers and in their testimony, the two Robinsons and Shoemaker are explicit and emphatic in denying, 1st, that it was within the power of the company, owing to its want of pecuniary means, to accede to and adopt the proposition, with the conditions involved, to run a daily line to make the connection on York river; 2nd, that it would have been wise or judicious to adopt the proposition, judging from the results of former experience, even if the company had been in a condition to comply with all the terms embraced in the proposition; and 3rd, that they were actuated, in the slightest degree, by motives or purpose to do wrong to the Powhatan Company, or that they acted with a view to the interest of other companies. And upon the whole evidence of the case, we discover nothing to justify us in withholding credence of their testimony.

The proposition for maintaining the daily line by way of York river, involved three conditions; 1st, that there

should be a daily instead of a tri-weekly connection with the railroad on York river; 2nd, that the Powhatan Company should put in complete repair its steamer Virginia, to be run on that line; and 3rd, that the Powhatan Company should purchase from the owners of the railroad their steamer Sue, to be run upon the same line with the Virginia.

The steamer Virginia could not, according to the lowest estimate, have been repaired for less than \$25,000, and, according to the testimony of several witnesses, full and complete repairs would have cost from \$60,000 to \$70,000. The price of the Sue was \$75,000, to be paid in the stock of the Powhatan Company at a valuation. This proposition, therefore, involved serious consequences to the company, especially in view of the fact of its limited resources, and of the conceded fact, that all prior efforts to maintain daily connection on that line had utterly failed. And in addition to this, there is an absence of apparent motive on the part of Robinson and Shoemaker to act in the matter with any wilful design of doing wrong to the Powhatan Company. That company had never been a serious competitor of the Steam Packet Company, their routes being different. The only company that was affected by the competition of the York river line was the Richmond, Fredericksburg, and Potomac Railroad Company; and that company, by the withdrawal of the steamers of the Powhatan Company, was left to compete with the more formidable rival of the Richmond and Chesapeake Steamboat Company, running its steamers in connection with the Richmond and York River Railroad, and in neither of which latter companies had the defendants, Robinson and Shoemaker, any interest whatever.

The charges in regard to the change made in the location of the wharf at Richmond, and the failure to repair the steamers of the company, are so fully explained in the



testimony that they need no extended examination. The change made in regard to the wharf was upon the urgent recommendation of the superintendent of the company at Richmond, and for what would appear to be very good and sufficient reason. The failure to repair the steamers would seem to have been for the best of all reasons, that is to say, it was doubtful whether they were really worth repairing, and to repair them to make them staunch and sufficient for service, required more money than the company had to expend, or could raise upon its credit.

In these transactions, therefore, we fail to find that the charges of the bill are supported, or that they afford any sufficient evidence upon the principles of law applicable to the case, for holding the defendants personally liable for fraud or breaches of trust in the management of the affairs of the corporation. We must not fail to observe, however, that there are circumstances in the case that were calculated to excite suspicion, and which tend to give color to some of the charges made in the bill. The strongest of these are the facts in connection with the buying up a controlling amount of the stock of the company in the summer of 1873, and the election of Mr. Kelson as director, he being at that time one of the directors in the Steam Packet Company. This was done, however, in the midst of the contention between Booth and Clyde on the one side, and Robinson and Shoemaker on the other, in regard to the proposed daily connection on the York river route; and with the views of the latter named contestants, as to the inability of the company to conform to the conditions proposed, and the certain failure or disaster that would ensue, if the proposition were adopted, they deemed themselves justified in what was done. Without at all approving their expedients to accomplish their purpose, we discover nothing in this conduct that would justify us in concluding that they were actuated by any fraudulent design to bring disaster upon the affairs of the Powhatan

Company, however unwise their conduct may have been. Upon the theory that they intended the ruin of the Powhatan Company, we must, at the same time, conclude that they deliberately intended to sacrifice the sixty-four or sixty-five thousand dollars that had been invested by the Steam Packet Company in the stock of the Powhatan Company;—a consequence that would go far of itself to rebut any presumption that might be indulged as to fraudulent motive or design on the part of those two directors as against the Powhatan Company.

That the company was utterly insolvent, and unable to proceed with its operations, with any prospect of success, at the time the stockholders in general meeting determined to close its affairs, is not disputed; and hence that resolution of itself forms no independent ground of complaint.

It follows therefore that the plaintiffs have failed to support the allegations of their bill in respect of the main ground of relief.

There is one other question remaining to be decided, and that is, whether the transaction between the two companies in regard to the steamer Petersburg was an absolute sale, or a mortgage only as a security for the loan of \$40,000?

The proposition from the Powhatan Company was for a loan of \$40,000. This was rejected, in that form, by the Steam Packet Company, but it agreed to advance the amount of money requested, upon receiving an absolute bill of sale for the steamer Petersburg, that the Powhatan Company had offered to mortgage. This proposition appears to have been acceded to, the money was advanced, and the absolute bill of sale executed. But there are several circumstances to show, that while the transaction was made to assume the form of an absolute sale, it was in substance, and, according to the understanding and intent of the parties, a mere loan of money,

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and that the instrument taken was but as security, and therefore a mortgage. In the charter of the steamer by the Steam Packet Company to the Powhatan Company, after the bill of sale, the rate of hire was fixed at \$1025 per month, the Powhatan Company to pay all the running expenses of the steamer, except the wages of the captain. The steamer was retained in the use and possession of the Powhatan Company for a considerable time under the charter, that company making all necessary repairs of the steamer; and the monthly payments were regularly made to and credited by the Steam Packet Company. It would seem to be clear, from the evidence in the case, that it was perfectly understood that if the Powhatan Company succeeded in paying back to the Steam Packet Company the \$40,000, with interest, either by the the monthly payments under the charter, or otherwise, the steamer was to be released to the Powhatan Company; and the account kept of the transaction by the Steam Packet Company appears to have been as for a loan of so much money. These circumstances, taken in connection with the peculiar relation subsisting between the two companies, admit fairly of but one construction, and that is, that the bill of sale, though absolute in form, was really intended as a security for the money loaned. And in such case, no matter how absolute the conveyance may be on its face, the transaction will be regarded as a mortgage, and will be treated as such. *Artz vs. Grove*, 21 Md., 456, 474. It is now the established doctrine that Courts of equity will look beyond the mere form and terms of the instrument to the real transaction; and whenever the real transaction is shown to be one of security and not of sale, the Court will treat the matter accordingly. In all such cases, the equity upon which the Court acts, arises from the real character of the transaction, and therefore, any evidence, whether written or oral, tending to show that the transaction was really one of security, is held to

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be admissible. This is allowed, not for the purpose of contradicting the terms of the deed or instrument, but of raising an equity paramount to the mere form of the instrument. Such proof is allowed upon the same principle that extrinsic proof is admitted to establish a resulting trust as against an absolute deed, or to show that the deed was made to give an undue preference, or that the consideration upon which it was made was in its nature illegal. The jurisdiction of the Court attaches to prevent fraud or oppression, and to promote substantial justice as between the parties. The cases maintaining this doctrine are numerous, and they may be found collected, and the result of them clearly stated, in the American note to the leading cases of *Thornbrough vs. Baker*, and *Howard vs. Harris*, 3 *L. Cas. Eq.*, (3rd Ed.) pp. 625, 626; *Russell vs. Southard*, 12 *How.*, 139; *Peugh vs. Davis*, 6 *Otto*, 332, 336.

Being of opinion, therefore, that the bill of sale of the steamer Petersburg must be treated as a mortgage, and not as an absolute conveyance of the steamer, we shall reverse the decree of the Court below and remand the cause, that a proper account may be taken as between the two companies in respect to that transaction. And as to the costs of this suit, we are of opinion, under the circumstances of the case, that they should be paid, the one-half thereof by the appellants, and the other half by the Baltimore Steam Packet Company.

*Decree reversed, and  
cause remanded.*

(Decided 2nd February, 1881.)

WILLIAM PINKNEY WHYTE and BENJAMIN F. HORWITZ, Trustees vs. CHARLES DIMMOCK.

*Allowance of Commissions in Equity—The word, Disbursements—Cost of Record.*

Under a decree of Court which allowed a rate of commission of five *per cent.* on the amount of "all collections which the trustee may make as trustee of the estate, and also, a further commission of five *per cent.* on the amount of all disbursements and investments which he has made, or may hereafter make;" which provision was referred to by a subsequent order appointing the appellants, trustees, as fixing the rate of commission to be allowed them, payments over to the appellee, a *cestui que trust*, of moneys collected, and upon which commissions had been allowed for such collection, were not disbursements within the meaning of the decree, in regard to the commission to be allowed. The word "disbursements" was used as meaning expenditures during the existence of the trust, as contradistinguished from payments over to the *cestui que trust*.

Where an appellee had audits and accounts incorporated into the record by his direction, which were not properly before this Court, it was HELD:

That the cost of that part of the record would be taxed to him.

APPEAL from the Superior Court of Baltimore City, in Equity.

By an order of the Court below, dated the 25th February, 1870, the appellants were appointed trustees of the estate of Mrs. Emily L. Dimmock, deceased, acquired under the will of her mother, Mrs. Juliet A. Moale, deceased, in the place and stead of the trustees named in the will, and "with the same rights, powers and duties as were bestowed and imposed on the trustees under the will, and with the same allowance to them for commissions on

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receipts and collections, and also on disbursements and investments," as were made to the acting trustee under the will, by a decree of the 18th December, 1861. The terms of this decree, as to the rate of commission to the then acting trustee, are stated in the opinion of the Court.

The appellee and his sister, Emily L. Dimmock, the children of Mrs. Emily L. Dimmock, deceased, were the *cestuis que trust*. The former having become of full age, and being entitled by the terms of the will, under which the trust was created, to have absolutely his share of the estate, on the 29th April, 1879, filed his petition, asking the Court to pass the proper order to that end, upon satisfactory proof as to the proper division of the estate. The trustees duly answered, admitting the allegations of the petition, and expressing themselves ready and willing to deliver his share to him. Testimony was taken, and the matter referred to the auditor to state a distributive account between the trustees and the appellee.

In this account, filed the 23rd July, 1879, the auditor awarded to the appellee the sum of \$810.35, being one-half of the cash admitted by the trustees to be in their hands, less the auditor's and Court costs, and the further sum of \$77.50, to make up the deficiency in the value of the stocks, ground rents, &c., awarded to him, as compared with the value of those awarded to his *co-cestui que trust*. The trustees had previously paid \$1000 to the guardian of these *cestuis que trust*, for their maintenance, by the Court's order, passed the 27th June, 1878, five per cent. commission being charged against that sum, as a disbursement. The auditor allowed them this commission.

The appellants excepted to the auditor's report, because it did not allow them the commission of five per cent. upon the sums of \$77.50 and \$810.35, the first being taken out of the income to equalize the division, and the second being taken as one-half of the cash in the hands of the trustees, for investments, but not yet invested, and to be

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disbursed to Charles Dimmock. And the appellee also excepted, because the account allowed the trustees a commission of five per cent. on \$1000 paid by the trustees to the guardian of the *cestuis que trust*, under the order passed 27th June, 1878.

The Court, (DOBBIN, J.,) on the 24th September, 1879, sustained the exception of the appellee, and overruled the exceptions of the appellants. The trustees appealed.

The cause was argued before BARTOL, C. J., BOWIE, GRASON, ALVEY, ROBINSON and IRVING, J.

*Benjamin F. Horwitz and Wm. Pinkney Whyte*, for the appellants.

*T. Wallis Blackistone*, for the appellee.

ALVEY, J., delivered the opinion of the Court.

Neither the original decree of 1861, nor the subsequent order of 1870, appointing the appellants trustees in the place of the former trustee, nor the audits that have been stated and ratified in the case, are before this Court for review. The only audit involved in this appeal is the last, upon which the order was passed overruling the exceptions of the appellants, and sustaining the exception of the appellee, and from which the present appeal has been taken.

The original decree of 1861 prescribes the law of the case, and the sole question presented here is, whether the order appealed from is in accordance with the proper construction of the terms of the original decree. By that decree, a rate of commission of five per cent. on the amount of "all collections which he (the trustee) may make as trustee of said estate, and also, a further commission of five per cent. on the amount of *all disbursements and investments* which he has made or may hereafter

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make," was fixed as proper to be allowed to the trustee of the estate. And in the order of 1870, appointing the appellants as trustees, this provision of the original decree was referred to as fixing the rate of commission to be allowed.

The Court below was of opinion, and so held, that payments over to the *cestui que trust* of moneys collected, and upon which commission had been allowed for such collection, were not disbursements, within the meaning of the original decree, in regard to the commission to be allowed. And in this we think there was no error.

There is no fixed statutory rule for the allowance of commissions to trustees in cases like the present. The allowance is made, however, with reference to the rates of commission allowed by statute in analogous cases (*Ringgold vs. Ringgold*, 1 *H. & Gill*, 11, 84); as in the cases of guardians, trustees or committees of persons *non compos mentis*, etc.

In the case of a guardian, having the care and administration of the estate of his ward, the statute declares, that, for his care and trouble in the management of the estate, "the Court may allow any commission not exceeding ten per cent. on the *annual income* of the estate." *Code, Art. 93, sec. 177*. And in the case of a trustee or committee of a person *non compos mentis*, the statute provides, that the Court may allow to the trustee or committee, having the care of the person or estate of the *non compos mentis*, for his care and trouble, "any sum not exceeding ten per cent. on the *income and expenditures* of such *non compos mentis*." *Code, Art. 16, sec. 85*.

In these cases, the guardian or trustee is not entitled to, and does not receive, commission on the fund that he pays over to the ward when he arrives at age, or to the *non compos mentis* when restored to reason, or to those representing such persons. It is only upon the amount of the receipts of income and the expenditures, during the con-



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tinuance of the trust, that commissions are allowed. The word *disbursements*, used in the decree of 1861, was manifestly used as meaning expenditures, during the existence of the trust, as contradistinguished from payments over to the *cestui que trust*. Otherwise there would have been no reason for separating the commissions to be allowed, and allowing five per cent. on the collections, and five per cent. on the disbursements and investments; the allowance would simply have been ten per cent. on the income or collections, or ten per cent. on the disbursements, as the Court might have deemed proper.

That the word *disbursement* is used as meaning expenditure, or rather as synonymous with that term, may not only be seen by reference to the dictionary, but to the case of *Winder vs. Diffenderffer*, 2 *Bland*, 166, 208, and same case on appeal, 3 *Gill & J.*, 311, 348; and in that sense, it clearly does not embrace payments over to the *cestui que trust* of his own funds.

As we have already said, none of the audits and accounts stated in the case are properly before this Court, except the last and to which the exceptions were taken; and as the appellee has had a considerable portion of the record incorporated by his own direction, the cost of that part of the record must be taxed to him. The order appealed from will be affirmed, with costs to the appellee, with the exception just stated.

*Order affirmed and  
cause remanded.*

(Decided 3rd February, 1881.)

JOSEPH GUNTHER *vs.* THE MAYOR AND CITY COUNCIL  
OF BALTIMORE.

*Taxation of Property in Ships—Constitution of the United States—Limitations—1861, ch. 94, and Art. 81, sec. 92, of the Code—1874, ch. 483, sec. 82.*

The interest of a citizen of Maryland, and resident of Baltimore, as part owner of vessels employed in foreign commerce, registered as vessels of the United States in the office of the Collector of Customs at Baltimore, the home port of the vessels, and the domicil and usual place of residence of their acting and managing owners, is liable for annual taxes levied on it for municipal purposes by the authorities of that city; and such taxation does not contravene the Constitution of the United States.

An action of *assumpsit* by the Mayor and City Council of Baltimore against a delinquent tax-payer, to recover unpaid taxes, is withdrawn from the operation of Art. 57, sec. 1, of the Code, relating to Limitations, by the Act of 1861, ch. 94, which extended the period for the collection of taxes levied in that city, from three to four years. Sec. 92 of Art. 81 of the Code, which required the collection of taxes within three years, (extended to four years by the Act of 1874, ch. 483, sec 82,) did not apply to the City of Baltimore.

APPEAL from the Baltimore City Court.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., BOWIE, GRASON, MILLER, ROBINSON and IRVING, J.

*William E. Gleeson* for the appellant.

*James L. McLane, City Counsellor,* for the appellee.

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MILLER, J., delivered the opinion of the Court.

This suit was brought by the appellee against the appellant to recover certain taxes for the years 1873, 1874, 1875 and 1876. The case was submitted to the Court below upon an agreed statement of facts, from which it appears the taxes in question were levied in pursuance of the general revenue laws of the State, upon the defendant's interest in certain vessels. It is agreed that, during these years, the defendant was a citizen of Maryland and resided in the City of Baltimore; that he was part owner of three vessels which were regularly registered as vessels of the United States, under the Act of Congress of December 31st, 1792, in the office of the Collector of Customs at Baltimore, the home port of the vessels, and the domicil and usual place of residence of their acting and managing owners; that under the powers conferred by its charter, the City of Baltimore, by sundry ordinances passed in these years, imposed an annual tax for general municipal purposes upon all assessable property in the city, and in virtue thereof, and upon the basis of assessments previously made and then in force, the several shares, interests and proportions belonging to the defendant and other part owners residing in Baltimore, in each of these vessels, were taxed by the City as assessable, and assessed *property* in the said city belonging to such resident part owners respectively. There is nothing in the record to show that this assessment was made, or the tax levied with reference to the *tonnage* of the vessels, but on the contrary they appear to have been valued and assessed in the same manner as other personal property or chattels would have been valued and assessed under the same laws. The general assessment laws then in force subjected to assessment and taxation, among other property, "the interest or proportion in all ships or other vessels, if registered in a port of Maryland, whether in or out of port, owned by residents of this

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State." *Code, Art. 81, sec. 2; Act of 1874, ch. 483, sec. 2.* It was further agreed that these vessels, during that time, were employed continuously and exclusively in foreign commerce, and seldom remained in the port of Baltimore more than ten weeks in any one year; that they have paid to the United States the usual tonnage duties prescribed by sec. 4219 of the Revised Statutes, and have also been compelled to pay to American consular officers in foreign ports, the fees allowed by the rates prescribed by the President, as required by law, and published in the regulations and circulars of the State Department.

Now it is contended that the tax so levied cannot be sustained because it is in contravention of the provisions of the Constitution of the United States, which confer upon Congress the power to regulate commerce with foreign nations and among the several States, and forbid the States, without the consent of Congress, to lay any duty of tonnage, or any imports, or duties on imports or exports, except what may be absolutely necessary for executing their inspection laws. The general question thus presented is not a new one, but has arisen, and been considered and adjudicated by the Federal and State Courts in many cases. In *Howell vs. The State*, 3 Gill, 14, our predecessors, in a very able opinion, declared that property in ships or vessels belonging to a citizen of this State, living within her territory, subject to her jurisdiction and protected by her laws, is part of his capital in trade, and like other property is the subject of State taxation. In that case a State law precisely like that now in force, subjecting to taxation the interest or proportion in all ships or other vessels, whether in or out of port, owned by persons resident of the State, was sustained and held not to be in violation of, or in conflict with any provision of the Federal Constitution. That decision has more than once been approved by the Supreme Court of the United States. Very recently in *Transportation Co. vs. Wheeling*, 9 Otto,

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275, where the question again arose, the Court reviewed all the authorities, and, without dissent, affirmed the law as stated in *Howell vs. The State*. The doctrine announced by the Supreme Court in that case is, that while taxes levied by a State on ships or vessels as *instruments* of commerce and navigation are prohibited, yet annual taxes for the support of the State Government levied upon ships or vessels owned by citizens of the State, as *property*, are perfectly valid. "It is too well settled" say the Court, "to admit of question, that taxes levied by a State upon ships or vessels owned by the citizens of the State as property based upon a valuation of the same as property, to the extent of such ownership, are not within the prohibition of the Constitution." Such a tax is a tax to the *owner* in the locality of his residence, and is not a tax upon the ship as an instrument of commerce. The prohibition against tonnage duties, when properly construed, does not extend to the investments of the citizens in such structures.

It is true that in these cases, as in all to which we have been referred, the vessels were engaged in the coasting trade, or inter-State, and not in foreign commerce. But how can this affect the principle of the decisions? A ship is as much property in the one case as in the other. The power of State taxation is not limited by the fact that the resident owner may choose to employ his vessel in foreign commerce, rather than in the coasting trade, nor can we discover anything in the constitutional prohibitions that will allow a State to tax it as property in one case, and forbid such taxation in the other. An owner living in Baltimore may employ his vessel in trading to Liverpool or to New Orleans, but in either case, it is his personal property, and like other such property its *situs* for the purpose of taxation, as well as in other respects, is the domicile of the owner. *Hooper vs. Mayor & C. C. of Balto.*, 12 Md., 464; *Hays vs. Pacific Mail Steamship Company*, 17 How., 596.

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To the right of the City to recover the taxes for the year 1873 the plea of limitations is interposed. The tax levy for that year was made by ordinance, approved April 12th, 1873, and this suit was instituted on the 9th of March, 1877, less than *four* years thereafter. By the Act of 1852, ch. 75, sec. 4, it was provided "that all taxes hereafter to be levied for county or city purposes shall be collected *by the collectors* of the counties and cities respectively within *three* years after the same shall have been levied, and in case the same shall not be collected within three years, then the party or parties from whom such taxes may be demanded may plead this section in bar of any recovery of the same." By the Act of 1860, ch. 91, sec. 1, it was provided that "all taxes now levied or which may hereafter be levied in the City of Baltimore, shall be collected within *three* years from the levying of the same, and the collection of taxes *shall not be enforced by law* after the lapse of said three years, and the party from whom said taxes may be demanded, may plead this section in bar of any recovery of the same." When the Code was adopted both these provisions were codified, the former becoming sec. 92 of Art. 81, of the Code of Public General Laws, and the latter sec. 880, of Art. 4 of the Code of Public Local Laws. It thus appears that the Legislature made a separate provision for the collection of taxes levied in the City of Baltimore, and the plain inference is that sec. 92, of Art. 81 of the Code of Public General Laws was not intended to apply to that City. Afterwards, by the Act of 1861, ch. 94, sec. 880, of Art. 4 of the Code of Public Local Laws, was amended so as to *extend* the period within which taxes levied in the City of Baltimore could be collected, to *four* years. This suit therefore, was *within time* under this statute, as respects the taxes for the year 1873. A similar *extension* of time as to the collection of "taxes levied for county and city purposes," as provided by sec. 92, of Art. 81, of the Code

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of Public General Laws, was afterwards made by the Act of 1874, ch. 483, sec. 82. In neither of these Acts is any reference made to the law relating to the limitation of actions generally, (*Code, Art. 57, sec. 1,*) but it is plain that an action of *assumpsit*, like the present, by the City of Baltimore against a delinquent tax-payer, to recover unpaid taxes, is withdrawn from its operation, by the Act of 1861, ch. 94, even if it should be held that but for this Act, such an action would fall within the provisions of the general limitation law.

*Judgment affirmed.*

(Decided 3rd February, 1881.)

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JOHN WESLEY TURPIN *vs.* THE STATE OF MARYLAND.

*Peremptory Challenges*—1872, ch. 40—*Evidence*—1864, ch. 109, and 1876, ch. 357.

At the trial of the appellant for murder, one of the panel of jurors was called, and being sworn and examined upon his *voir dire*, it was determined by the Court that he was an impartial juror; the prisoner then moved the Court to require the State to exercise its right of peremptory challenge before he should be required to exercise that right. But the Court overruled the motion, and in conformity to its uniform practice required the prisoner to exercise his right of peremptory challenge before the State was called on to exercise its right. Whereupon the prisoner excepted. **HELD:**

That this ruling furnished no cause for reversal.

The Act of 1872, ch. 40, relating to peremptory challenges, does not prescribe the order in which challenges shall be made, or direct whether the State or the prisoner shall first exercise the right. It would seem, therefore, that the course of proceeding in this respect is left to the discretion of the Circuit Court. It appears, that the

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practice in the circuits has not been uniform, while in several of them the practice has been to require the State to challenge first, in the City of Baltimore, and in the first and fourth circuits a different rule has prevailed.

Evidence offered by the defence on an indictment for murder, which was mere matter of inducement, and not part of the *res gestae*, and would be mere hearsay and immaterial to the issue in the cause, was properly excluded.

Evidence offered by the defence on an indictment for murder, to the effect that the deceased prior to the homicide, threatened the defendant's life is inadmissible, unless proof be first given that there was an overt act of attack, and that the defendant at the time of the collision, was in apparent imminent danger.

On an indictment for murder, the prisoner's wife was called for the defence, but was properly not permitted to testify. A wife has not been made competent in such a case by the Acts of 1864, ch. 109, and 1876, ch. 857.

APPEAL from the Circuit Court for Wicomico County.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., MILLER, ALVEY and ROBINSON, J. for the appellee, and submitted for the appellant.

*Henry Page* and *John W. Crisfield*, for the appellant.

*John H. Handy* and *Charles J. M. Gwinn*, Attorney-General, for the appellee.

BARTOL, C. J., delivered the opinion of the Court.

The appellant was indicted in the Circuit Court for Wicomico County for the murder of William F. Farrington, and was found guilty of murder in the second degree. During the trial he took six bills of exceptions to the rul-



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ings of the Court below, which are brought before us for review on this appeal.

*First Exception.*—One of the panel of jurors was called, and being sworn and examined upon his *voir dire*, it was determined by the Court that he was an impartial juror; the prisoner then by his counsel, moved the Court to require the State to exercise its right of peremptory challenge, before the prisoner should be required to exercise that right. But the Court overruled the motion, and required the prisoner to exercise his right of peremptory challenge before the State was called on to exercise its right; whereupon the prisoner excepted.

It is stated in the bill of exceptions that this ruling was in conformity to the uniform practice in that Court.

“Peremptory challenges are those which are made to the juror, without assigning any reason, and which the Courts are bound to respect.” 1 *Ch. Crim. L.*, 534 m.

“The right of peremptory challenge is deemed a most essential one to a prisoner, and is highly esteemed and protected in law. It is the right to exclude from the panel those who may be suspected of entertaining a prejudice against a party, where sufficient reasons cannot be given for their exclusion for cause.” *Proffat on Jury Trials*, sec. 155.

This right of challenge in capital cases, was recognized in England for a long period of time, to the number of thirty-five. It has since been regulated there by various statutes, which need not be here referred to. In this State it has been secured to the prisoner by the Acts of 1737, ch. 2, 1744, ch. 20, 1751, ch. 14, 1809, ch. 138, sec. 13, 1816, ch. 45. By the Act of 1841, ch. 162, the right of peremptory challenge was extended to every person indicted for any crime or misdemeanor, the punishment whereof was confinement in the penitentiary. This Act was incorporated in the Code, Art. 50, sec. 15, which provides further that the accused shall not challenge

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more than *twenty* jurors without assigning cause. So stood the law before the *Act of 1872, ch. 40*. This was an act to repeal *sec. 15, Art. 50*, of the Code, and to re-enact the same with amendments, giving to the State the right of peremptory challenge in certain cases, and it provides "That the right of peremptory challenge shall be allowed to any person who shall be tried on presentment or indictment for any crime or misdemeanor, the punishment whereof, by law, is death, or confinement in the penitentiary, and to the State on the trial of such indictment or presentment; but the accused shall not challenge more than *twenty*, nor the State more than *four* jurors, without assigning cause."

Before this Act was passed, no right of peremptory challenge by the State existed in Maryland; except in the City of Baltimore under the Act of 1860, *ch. 308, sec. 18*. (*2 Code, sec. 618*.)

By the common law the prosecution in criminal cases could exercise on behalf of the crown peremptory challenges to an unlimited extent, without alleging any other reason than "*quod non boni sunt pro rege*." *Proffat, sec. 159*.

This was changed by the *Statute of 33 Edw., 1, ch. 4*, which while it took away from the crown, the unlimited right of peremptory challenge, was construed by the Courts to allow the prosecution a qualified right of peremptory challenge, which was exercised by allowing the prosecution the privilege of setting aside jurors when called, without assigning cause, until the panel was exhausted, when if the full number was obtained, such jurors were not called, but if not, their names were afterwards called on the general list. *Reg. vs. Frost, 9 C. & P., 136*; *Mausel vs. The Queen, 8 E. & B., 54*.

In *Brandreth's case*, the question arose whether the prisoner should be required to exercise his right of peremptory challenge, before the right of challenge was

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exercised by the crown, and after full argument, it was decided that according to the uniform practice, the right must first be exercised by the prisoner. 32 *State Trials*, 771, 774, 775.

A similar decision had been made in *Layer's Case*, 16 *State Trials*, 135.

We refer also to *State vs. Bone*, 7 *Jones' Law R.*, 121.

In *Jones vs. The State*, 2 *Blatchford*, 475, the same question here presented arose under the Indiana Statute. The Circuit Court overruled the motion of the defendant that the State's Attorney should be required first to accept or reject the juror, before the defendant should be called on to make his election, and certain jurors after they had been accepted by the defendant, were set aside by the prosecuting attorney, which was alleged as error. The appellate Court in disposing of the question, said: "The only question on this point is who shall first make his challenge? If this were a new question, and we had it to settle, we should say that the State ought first to make her challenges, but as all the English authorities establish a different doctrine, and no American cases have been seen by us to authorize a different practice, we are bound for the present to sanction what the Circuit Court has done."

In *State vs. Hays*, 23 *Missouri R.*, 287, a similar question arose. The Missouri statute like our act of 1872, allowed the accused twenty peremptory challenges and the State four, the prisoner moved that the State should be required to exercise its right of challenge first, this was overruled and the panel or list of jurors, was furnished to the State's attorney and to the prisoner, and each was required to exercise their right of peremptory challenge at the same time, by striking from the list of thirty-six jurors, the objectionable names, neither knowing which had been stricken by the other. This was alleged as error and cause of reversal. The Supreme

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Court speaking by Judge RYLAND said: "We do not think this such an error as would justify the court in reversing. The prisoner does not appear to have been deprived of any legal right. In what order the parties shall exercise this right, is a matter within the discretion of the Circuit Court. The simplest rule upon this subject, and one to which there would seem to be no objection, is that of requiring the parties to challenge as the jurors are called, and pronounced qualified, the plaintiff always speaking first. This rule I believe has been generally practiced, at least as far as my experience upon the Circuit Court extends, I never knew it deviated from, and that experience embraces a period of eighteen years. But as the rule adopted in this case deprives the prisoner of no legal right, and it does not appear that the discretion was exercised oppressively, it forms no ground for reversal. The right of peremptory challenges is a right to reject and not to select a jury."

In *State vs. Steeley*, 65 *Missouri*, 219, it was decided that "in criminal cases the State must announce her peremptory challenges of jurors, before the defendant can be required to announce his." But that decision was made under a statute, which in express terms, prescribed that course of proceeding.

The Act of 1872 does not prescribe the order in which the challenges shall be made, or direct whether the State or the prisoner shall first exercise the right. It would seem, therefore, that the course of proceeding in this respect is left to the discretion of the Circuit Court. It appears from the statements of my brothers, who preside in the circuits, that the practice has not been uniform; while in several of the circuits the practice has been to require the State to challenge first; in the City of Baltimore, in the fourth circuit, and in the circuit from which this appeal comes, a different rule has prevailed. But it seems to us very clear that the action of the Circuit Court

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on this question can furnish no ground for reversal. The appellant has not been deprived of any legal right. His complaint is that by the ruling of the Court below, after having accepted certain jurors, they were challenged by the State, and he was thus deprived of jurors of his selection. But the law gives him the right only to reject, not to select the jurors. This subject was fully considered in the able opinion of Judge STORY in *U. States vs. Marchant and Colson*, 12 *Wheaton*, 480. There two parties were indicted jointly and claimed the right to sever, and be tried separately; this was denied, and this ruling was alleged as error. But the Court held it was not error to require them to be tried together. If tried in that way, it was conceded that each of the accused had the right to challenge the whole number allowed by statute, and it was contended on the part of the accused, that as one might desire to retain a juror who is challenged by the other, and if challenged by one he must be withdrawn as to both, and thus the right of selection would be virtually impaired. In answer to this argument the learned judge said: "But it does not appear to us that this reasoning can, upon the principles of the common law be supported. The right of peremptory challenge, is not of itself a right to select, but a right to reject jurors. It excludes from the panel those whom the prisoner objects to, until he has exhausted his challenges, and leaves the residue to be drawn for his trial, according to the established order and usages of the Court. The elementary writers nowhere assert a right of this nature in the prisoner, but uniformly put the allowance of peremptory challenges upon distinct grounds. Mr. Justice Blackstone in his commentaries, (4 *Bl. Com.*, 353) puts it upon the ground, that the party may not be tried by persons against whom he has conceived a prejudice, or who if he has unsuccessfully challenged them for cause, may on that account conceive a prejudice against the prisoner. The right, therefore, of

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challenge does not necessarily draw after it the right of selection, but merely of exclusion. It enables the prisoner to say who shall not try him; but not to say who shall be the particular jurors to try him. The law presumes that every juror sworn in the case is indifferent, and above legal exception; for otherwise he may be challenged for cause."

The reasoning of the learned judge is applicable to the question before us. The only ground of objection to the ruling of the Circuit Court, urged by the appellant, is that he was thereby deprived of jurors, who were acceptable to him; but it is obvious that the same result might follow, whether the right of challenge by the State be exercised before or after the prisoner has spoken. In either case the prisoner would not be deprived of any legal right, which as we have seen is not a right to *select* the jurors, but simply to *reject* such as he may consider objectionable, to the number of twenty. This privilege was enjoyed by the appellant without restriction.

And as the statute does not prescribe the order in which the challenges shall be made by the prisoner and the State respectively, the determination of that question was left to the judgment and discretion of the Circuit Court.

It follows that the ruling contained in the *first bill of exceptions*, furnishes no cause for reversal.

*The second bill of exceptions* was taken to the exclusion by the Circuit Court of the conversation between *George Brown*, one of the farm hands of the deceased, and *Columbus Horsey*, one of the witnesses for the State, which took place on the morning of the day when the deceased was killed. This testimony was offered by the defence on the cross examination of *Columbus Horsey*, who was an eye witness of the homicide. The witness on his examination in chief was asked, "how came you to be there?" and answered, "George Brown told me Mr. Farrington was going after his pigs." On cross-examination he was

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asked by the prisoner's counsel, "to state all that conversation, in which he had stated that George Brown had told him that Mr. Farrington was going after his pigs."

To which question the State by its counsel objected, which objection the Court sustained, on the ground that the question of the State put to the witness, and his answer as far as it went, was mere matter of inducement, and that the balance of the conversation was not part of the *res gestæ*, and would be mere hearsay, and immaterial to the issue in the cause, whereupon the prisoner by his counsel excepted.

There can be no doubt or question of the correctness of this ruling; and for the reasons assigned by the Circuit Court, the testimony was properly excluded.

The same may be said of the ruling in the *third bill of exceptions*, which presents the same question. The same witness was asked, "what information was given him by Brown, in that conversation with him about Farrington going after his pigs." The counsel of the prisoner being asked what the object of the question was, stated that "they wanted to know all that Brown said of the deceased's purposes in going after his pigs, including his manner and language in the declaration of such purposes." This was excluded and very properly as such testimony would be mere hearsay, and wholly immaterial. In the argument of the cause in this Court, no point has been made by the appellant's counsel, upon the second and third bills of exceptions, and no argument is needed to show that there was no error in the rulings of the Circuit Court upon the questions therein presented.

*Fourth bill of exceptions.*—It appears from the facts stated in the *second bill of exceptions*, that the killing of the deceased by the appellant was proved by the witness, *Ashby Turpin*, who also proved the circumstances which preceded and attended the homicide. It appears from his testimony, that there were some pigs on the farm of the

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appellant which were claimed by the deceased, that the latter had sent the witness and *George Brown*, one of the farm hands of deceased, in the morning to get the pigs, and the appellant prevented the men from taking them; when the deceased was informed of this, he became excited, and called on his wife for his revolver, which she at first refused to get for him, but on being assured that he would not use it except in self defence, she got it and gave it to him, and he expressed his determination to have his pigs; the deceased afterwards asked witness to go with him after dinner to get the pigs.

Evidence was also given by witnesses introduced by the State, tending to show that *George Brown*, *Thomas Handy*, *Archelaus Rounds* and *Ferdinand Goslee*, were farm hands of *Farrington*, (the deceased,) at his residence, of whom *Thomas Handy* and *Archelaus* were summoned by deceased, through the witness, *Ashby Turpin*, to go with deceased and witness after the said pigs; and that *Brown* and *Goslee* watched them as they went; that the deceased carried with him his revolver, in his left breast under his vest; and followed by *Handy* and *Rounds* went to the premises, and against the protest of the appellant, attempted to drive off certain hogs, and at the gate of the appellant leading into the county road, and on the inside thereof, the deceased was killed by the discharge of a gun, in the hands of the appellant. *Columbus Horsey*, *Ashby Turpin*, *Thomas Handy*, *Archelaus Rounds* and *Nannie Turpin*, daughter of appellant, were present and testified to the circumstances of the killing; their testimony, except that of *Ashby Turpin* and *Columbus Horsey* is not contained in the record. It appears by the *fourth* bill of exceptions that *George Brown*, a witness for the State, on his cross-examination after testifying to substantially the same facts as had been deposed to by the witness *Ashby Turpin*, as to what took place after the witness and *Ashby Turpin* returned from the farm of the



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appellant and informed the deceased of their failure to get the pigs, further testified that after deceased got the revolver from his wife, he asked witness if he had any caps and lead, that witness replied that he had caps but no lead, deceased then asked witness to bring him six or seven caps, which witness afterwards did. Later, on the same day, deceased asked witness to go over to Turpin's with him after the pigs, and on witness declining, deceased asked him "if he was afraid?" to which witness replied, "no, I am not afraid, but Turpin has told me not to go on his land again, and I am not going." On the same morning Columbus Horsey came to the corn field of the deceased, where the deceased was, and the two talked together about an hour; Horsey then came to him, witness, and witness told him that deceased was going over to Turpin's that day for the pigs.

The prisoner then proved by *William Brown*, that after breakfast, the witness with his brother George Brown, returned to Farrington's house, George carrying with him the pistol caps, which were delivered to the deceased; at that time Farrington was attempting to fire at a post; that later in the day witness saw the deceased and Ashby Turpin, followed by Tom Handy and Archelaus Rounds go over to Turpin's, and soon after saw Mrs. Farrington, wife of the deceased, proceeding in the direction of Turpin's, who went as far as the line fence which divided the premises of the deceased from those of the prisoner; that witness saw the deceased and parties with him, and also the prisoner and family moving about the premises of the prisoner, but was too distant to hear any words, saw them move into the lane towards the gate; heard the explosion of the gun at the gate, and immediately ran to the spot, and found the deceased lying on the ground near the gate in a dying condition, with a large revolver in the bosom of his coat, on the left side, which said revolver seemed to be the same that witness had seen the deceased have early in the day.

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The traverser then introduced Alexander Goslee, a competent witness and offered to prove, that on the morning of the same day, before noon, the deceased came to the store of witness in the town of Quantico, two miles from the residence of the deceased, and applied for the purchase of shot, and the largest he had, which witness sold him ; and at the same time the prisoner stated he would follow up the said evidence, with further evidence, that about two months before, the deceased and the prisoner had a quarrel on the public road, in the course of which, and as they separated, the deceased declared he would be prepared for him (the prisoner) as he returned, and that the prisoner had been informed on the day of the shooting by his son, that he had that day met the said deceased on the road to Quantico, and that he (the son) suspected the deceased was preparing for him.

To which evidence so offered to be proved by the said Goslee the State objected, which objection the Court sustained, and refused to allow the said evidence to go to the jury, because the purchase of shot by the deceased was not known or communicated to the prisoner, and that several witnesses who were present, had testified to the circumstances of the killing. To this ruling the appellant, by his counsel, excepted.

This exception and the *fifth*, which present similar questions, have been argued together, and will be disposed of in the same way.

*The fifth bill of exceptions* was taken to the exclusion by the Court of evidence offered by the appellant, that in August, 1879, the deceased, with *Brady* the witness, were driving cattle of the prisoner off the premises of the deceased, when the deceased, in conversation with the witness, said, "I don't want his (Turpin's) cattle to trespass on me, nor my cattle to trespass on him ; but if he (Turpin) ever crosses my path, I will shoot him as sure as he is a man." There being no proof given or offered that

this threat of the deceased had been communicated to the prisoner, the evidence was excluded.

We are of opinion there was no error in the ruling by the Circuit Court contained in these exceptions.

The purchase by the deceased of shot from the witness Goslee, was in the forenoon of the day, and several hours before the homicide was committed, it is obvious that it was not part of the *res gestæ*; it further appears that it was not known to the appellant, and therefore was not admissible evidence upon any ground. As to the previous threats made by the deceased in his conversation with Brady, these were not known or communicated to the appellant.

This subject is very fully and ably treated in the excellent work by *Wharton on Evidence in Criminal Cases*, sec. 757: "Can evidence," says the learned author, "to the effect that the deceased, prior to the homicide, threatened the defendant's life be received, and if so is it a prerequisite to the proof of such threats that they be shown to have been communicated to the defendant? Certainly, if such evidence is offered to prove that the defendant had a right to kill the deceased, there being no proof of hostile demonstration by deceased, then it is irrelevant." The author proceeds, in the same section, to show that, in some cases, such evidence ought to be received, and cites several authorities. Among these is *Wiggins vs. The People*, 93 U. S., 465, where it was held to be admissible. In that case the Court said, quoting from Wharton, that "It was not relevant to show the *quo animo* of the defendant, but it may be relevant to show that, at the time of the meeting the deceased was seeking defendant's life." There the question, whether the prisoner or the deceased commenced the encounter which resulted in death, was left in doubt, and it was held that in such case previous threats by the deceased, though not communicated to the defendant, were properly admissible in evidence, as tending to show that the encounter

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was begun by the deceased, and that the defendant acted in self-defence.

But the rule is correctly stated by Wharton in the same section "that such evidence is inadmissible, unless proof be first given that there was an overt act of attack, and that the defendant, at the time of the collision, was in apparent imminent danger," and for this many cases are cited in note 2.

In this record no such proof appears, the homicide was proved by several eye-witnesses, no evidence appears to have been given of any overt act of attack by the deceased, nor is there any evidence tending to show that the appellant was in any apparent imminent danger. It was shown by the testimony of defendant's witnesses that when the deceased obtained the pistol, he asserted that he would not use it except in self-defence, there was no proof that he drew the weapon upon the appellant, but on the contrary the testimony of William Brown, one of the witnesses for the defence, was that when he was shot down by the appellant, the weapon was in his breast pocket. In the face of this testimony, it is clear, both upon reason and authority, that the evidence offered in the *fifth bill of exceptions* was wholly inadmissible.

The *sixth bill of exceptions* presents the question, whether the wife of the appellant was a competent witness. She was called for the defence, but was not permitted to testify.

By the common law she was not a competent witness, this is conceded; but it is contended that she has been made competent by our Evidence Acts of 1864, *ch.* 109, and 1876, *ch.* 357.

The Act of 1868, *ch.* 116, simply repealed and re-enacted with amendments the second section of the Act of 1864, it has no application here, and need not be further referred to. The question turns upon the construction of the first and third sections of the Act of 1864, and the Act of 1876.

The Act of 1864, *sec* 1, provides "that no person offered as a witness shall hereafter be excluded by reason of

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*incapacity from crime or interest*, from giving evidence, &c., in the trial of any issue joined or hereafter to be joined, or of any matter or question, or on any inquiry arising in any suit, action or proceeding, civil or criminal, in any Court, &c., but that every person so offered may and shall be admitted to give evidence, notwithstanding that such person may and shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question or inquiry, or of the suit, action or proceeding in which he is offering as a witness, &c. \* \* \* and the parties litigant and all persons in whose behalf any suit, action or other proceeding may be brought or defended, themselves and their wives and husbands shall be competent and compellable to give evidence in the same manner as other witnesses, except as hereinafter excepted."

The 3rd section provides that "no person who in any criminal proceeding, is charged with the commission of any indictable offence, or any offence punishable on summary conviction, shall be competent or compellable to give evidence for or against himself, \* \* \* nor in any criminal proceeding, shall any husband be competent or compellable to give evidence for or against his wife, nor shall any wife be competent or compellable to give evidence for or against her husband, except as now allowed by law," &c., &c.

The Act of 1876, ch. 357, repealed the 3rd section of the Act of 1864, and enacted in lieu thereof the following:

3. "In the trial of all indictments, complaints and other proceedings against persons charged with the commission of crimes and offences, and in all proceedings in the nature of criminal proceedings, in any Court of this State, &c., &c., the person so charged shall, at his own request, but not otherwise, be deemed a competent witness." \* \* \*

The contention on the part of the appellant is that, under the first section of the Act of 1864, if it had stood alone the party accused, *himself*, or his wife would have been a competent witness; but the *third* section qualified

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the provisions of the first, and declared that in criminal cases neither the party himself, nor his wife, should be competent or compellable to testify; and when this *third* section was repealed by the Act of 1876, and the party accused was made a competent witness for himself, it follows that the provisions of the first section of the Act of 1864, in so far as they declared the wife of the accused to be incompetent to testify, being repealed, the provisions of the first section, in that respect, have been left in full force, and therefore the wife of the appellant was a competent witness, and ought to have been allowed to testify in his behalf.

If this construction be sound, it would follow that the wife of the accused would not only be *competent* to testify in his behalf, but would be *compellable* to testify against him—a conclusion which we would hesitate to adopt, unless compelled by the plain meaning and intent of the statutes. But we think this construction is not correct.

The object and intent of the Act of 1864 was to remove the incapacity of persons called to testify, arising from crime or *from their interest in the subject-matter* of the suit.

But the incompetency of a husband or wife to testify for or against each other in a criminal prosecution at the common law arose not from interest in the result of the suit, but was based upon considerations of public policy, growing out of the marital relation; as said by WIGHTMAN, J., in *Stapleton vs. Crofts*, 83 *Eng. C. L. R.*, 369, "from the interest which the public have in the preservation of domestic peace and confidence between married persons." We refer also to *Wharton's Cr. Ev.*, secs. 400, 437; *Lucas vs. Brooks*, 18 *Wall.*, 453; *Steen vs. The State*, 20 *Ohio*, 333.

Looking at the language of the first section of the Act of 1864, we think it very clear that standing alone it would not operate to alter the rule of the common law which made a husband or wife an incompetent witness in a criminal prosecution against the other.

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The words of the section in which "*the parties and their wives and husbands are declared to be competent and compellable to give evidence,*" in our opinion, apply only to civil suits, and have no reference to criminal prosecutions. This is apparent not only from the phraseology of this part of the law, where it speaks of "*the parties litigant*" and of "*persons in whose behalf any suit, action, or other proceeding may be brought or defended,*" language only applicable to civil suits, but also from the terms by which the parties themselves and their wives and husbands are made not only *competent* but *compellable* to testify, a provision which evidently was not intended to apply to criminal prosecutions.

The *third* section was passed to prevent any possible misconstruction of the *first* section in this respect; and when by the Act of 1876 the third section was repealed, and the parties accused were *allowed* to testify in their own behalf, this last Act had no other effect except so far as it related to the parties accused, making them *competent* to testify in their own behalf in criminal cases.

By repealing the *third* section of the Act of 1864 the construction of the *first* section was not changed, and that section, properly construed, did not remove the incompetency of the wife, which existed at the common law, to testify in the case of a criminal prosecution against her husband.

*Rulings affirmed and  
cause remanded.*

(Decided 11th February, 1881.)

MATTHEW DE ATLEY *vs.* ABRAHAM SENIOR AND  
EDWARD SENIOR, trading as A. SENIOR & SON.

*Practice in Baltimore City—1864, ch. 6—The Affidavit by  
Plaintiff—Record.*

On a motion made by the defendant at the same term to strike out a judgment extended on a judgment by default in a Court of Baltimore City, for surprise and irregularity, it appeared that the affidavit required by the Act of 1864, ch. 6, (to entitle the plaintiff to a summary judgment,) to be filed at the bringing of the suit, was made by the plaintiff's book-keeper, and not by the plaintiff himself. **HELD:**

That, the affidavit being insufficient, the judgment should be struck out, and the defendant let in to plead, that the case might be tried on its merits.

The record is construed, as it comes certified to this Court.

APPEAL from the Superior Court of Baltimore City.

The case is stated in the opinion of the Court. The affidavit therein mentioned was made before a notary public and certified by him at Cincinnati, the place of residence of the plaintiffs.

The cause was argued before BARTOL, C. J., GRASON, MILLER, ROBINSON and IRVING, J.

*F. C. Cook*, for the appellant.

*R. H. Goldsborough* and *John F. Preston*, for the appellees.

IRVING, J., delivered the opinion of the Court.

The appeal in this case is from the refusal of the Superior Court of Baltimore City, to strike out a judgment



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rendered by that Court in favor of the appellees against the appellant. The judgment was extended for \$166.68 and costs, on the 12th day of January, 1880, in pursuance of an alleged judgment, by default on the 5th of January, 1880. On the 20th of January, 1880, during the same term at which judgment by default, and on extension, appear to have been rendered, the motion to strike out was made, and on the 2nd day of July, following, the motion was overruled.

The petition alleges surprise at the entry of the judgment; and asks that it be stricken out for the following reasons, viz. 1st. Because the claim for which it was rendered has been paid. 2nd. Because the judgment by default, and the extension thereof were irregularly entered,—and 3rd, for other reasons to be assigned at the hearing.

It will not be necessary for us to consider or pass upon any of the reasons assigned, except the one alleging irregularity in the entry of the judgment by default and the final judgment on extension; for according to our view of the case, there was such irregularity in the entry of the judgment by default and on extension as ought to have induced the Court, on the motion made, to strike it out, that trial might be had on the merits.

Upon this motion alleging irregularity, the whole question of jurisdiction and whether the proper steps necessary to justify the entry of judgment by the Court, is open before us.

We cannot sustain the contention of the appellant's counsel that no judgment by default was rendered in the cause. We cannot so construe the record as it comes certified to us. Notwithstanding some apparent transposition of the entries, so that the entry of judgment by default does not appear to have followed immediately upon the motion for it, and to have preceded the continuance of the cause; yet it is certified as having been entered

on the day the motion was made, and we must hold that it was rendered and entered on that day and in proper order of time, immediately upon the motion for it. If however this judgment by default was improvidently entered without the necessary preliminary proceedings to entitle the plaintiffs to it, the judgment on extension was also irregular and both ought to have been stricken out and defence allowed to be made. Without considering any other ground of error suggested, there is one serious and fatal objection patent of record. It involves the construction of the Act of 1864, ch. 6, in respect to a question not heretofore raised or decided in this Court. The seventh section of that Act provides: "In any action brought for any of the causes mentioned in the last preceding section, *the plaintiff*, if he make affidavit or affirmation, as hereinafter stated, shall be entitled to judgment on the first day of the term of the Court, in which said action is pending, or at the return day next succeeding the appearance of the defendant, which ever shall first happen or occur, although the defendant may have pleaded; unless such plea contains a good defence, and unless *the defendant or some one in his behalf* shall make oath or affirmation that said plea is true, and that he verily believes, that he will be able at the trial of the cause to produce evidence in support of said plea."

By the eighth section of the Act this affidavit of the plaintiff must be made at the time of bringing the suit; and the contention of the appellant's counsel is, that the express language of these seventh and eighth sections requires, this affidavit is to be made by the plaintiff, and that it can be made by no one else. We can not doubt that this is the proper construction of the Act, and that the want of such affidavit by the plaintiffs was a fatal objection to the proceeding; and that for the want of it, the plaintiffs could not justifiably ask for judgment by default as was done, and the Court

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could not properly grant the motion and enter the judgment.

The affidavit filed with the declaration is not the affidavit of the *plaintiffs*, but of a person stated in the affidavit to be the *plaintiffs' bookkeeper*. Manifestly, this was not a compliance with the requirements of the Act. The Act provides a special proceeding, by which a plaintiff, by taking certain prescribed steps, is allowed to get a judgment against his debtor sooner than by the usual mode, and without waiting to give the defendant an opportunity to plead. It puts the defendant, who is summoned after such preliminary steps are taken, to the necessity of appearing at the return day, and putting in his defence in the way indicated by the statute, and if he fails to do so, allows the judgment to go at once by default.

According to all the rules of construction applicable to statutes of this character, the provisions of the statute must be strictly pursued to entitle a suitor to the benefits accorded by it. It is analogous to the law of attachment against non-resident and absconding debtors. There the affidavit, which is the pre-requisite to the issuing of the warrant and the subsequent issuing of the writ, is required to be made by the *plaintiff*, and it has always been held he alone could make it, and that the affidavit of no one else but the creditor would suffice to sustain the proceeding. In construing this Act of 1864 with respect to the kind of claim that judgment might be obtained for under its summary provisions, this Court, in the case of *Bouldin vs. Stibel*, 31 Md., 34, said that the language of this Act must be accorded the same construction which had been given to the same language when used in the attachment law. Inasmuch as each law provides a summary mode of collecting a claim, the same construction should be applied to the same language occurring in both laws to indicate the affidavit to be made, and the person by whom it

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should be made. Inasmuch as in the first part of section seven, it is expressly provided, that the *plaintiff* shall make the affidavit which is to be filed when suit is brought, and in the subsequent part of the same section where it provides for the verification of the plea, it provides that the *defendant*, or *some one* in his behalf, shall make oath to the *bona fides* of the defence, and the expectation of supporting it by proof at the trial, it becomes indubitably clear that the law intended the difference which is indicated, and designed the plaintiff, and no one else, should make the affidavit to the claim on which suit was brought to entitle him to the benefits of summary judgment. In the light of this provision for the defendant, the maxim *expressio unius exclusio alterius*, forbids the interpolation by construction, after the word "plaintiff" of "or some one in his behalf." There is manifest reason also for making the difference, and requiring the plaintiff to make his own affidavit, while the defendant, or his attorney, or some one else, is permitted to make affidavit to the *bona fides*, &c., of defence. The plaintiff alone is supposed to know whether the claim is honest and how much is due; while the defence might rest on grounds to which some other person could, with more safety and knowledge, swear. It is not, however, necessary to look for reasons for such provision. We must deal with it as we find it, and interpret it according to its language and the rule applicable to the construction of such summary legislation in derogation of the common law. No countenance is given, in either the seventh or eighth section of the statute, to the idea that any one but the plaintiff can make that affidavit. The affidavit being, for the reasons assigned, adjudged insufficient, it will not be necessary for us to inquire into or determine the competency of the officer before whom it was made, and by whom it is certified, to take and certify it. We therefore express no opinion on that point. We think the Court below erred in over-

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ruling the motion to strike out the judgment; and the judgment will be reversed and the cause remanded, to the end that the judgment by default and the final judgment may be stricken out, and the defendant may be allowed to plead, and the case may be tried on its merits.

*Judgment reversed and  
new trial awarded.*

(Decided 18th February, 1881.)

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WILLIAM H. RUBY AND HENRY C. LONGNECKER *vs.*  
THE STATE OF MARYLAND, use of ELIZABETH A.  
VERNAY, by her husband and next friend, JOHN J.  
VERNAY.

*Action by a Legatee on Executors' Bond—Evidence—Defective Prayer.*

The *narr.* in a suit by a legatee on an executors' bond against the executors and sureties, set out the bond, its approval by the Orphans' Court, and that the executors undertook and assumed the office of executors of J. H. W., deceased, and alleged that the executors had not faithfully performed their duties without injury to persons interested, and assigned as breach "that large amounts of money came into their hands as executors, which were properly due and payable by them to E. A. V., (the legatee,) as and for her share of the estate of her father, the said J. H. W., deceased, yet the executors failed and neglected to pay over to her a large amount of said money, to wit: the sum of \$652; although such proceedings were had in the Orphans' Court of Baltimore County, that on the 23rd January, 1878, an order was passed by said Orphans' Court, whereby the said executors were expressly ordered to pay over to the said E. A. V., the said sum of \$652, in full of her share of the said estate." It further alleged notice to the executors, demand and non-payment, and consequent liability of the defendants. To this *narr.* the appellants demurred. **HELD:**

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- 1st. That the demurrer should be overruled.
- 2nd. That the will of J. H. W. was properly admitted as evidence in support of E. A. V's right of action.
- 3rd. That a record of the proceedings in the Orphans' Court showing the indebtedness of the executors to E. A. V., and containing the order of that Court directing its payment, was admissible in evidence.
- 4th. That a prayer of the defendants, that the administration accounts of the executors, wherein they craved allowance for \$205.69, to have been paid E. A. V. in full of her share of the estate, be declared conclusive, and that the plaintiff could not recover, was properly rejected.

APPEAL for the Court of Common Pleas, on removal from the Circuit Court for Baltimore County.

The case is stated in the opinion of the Court.

*Exceptions.*—At the trial the defendants took three exceptions, which are substantially stated in the opinion. The third exception contains the four prayers offered by the defendants, which on being rejected by the Court, (BROWN, J.,) the defendants excepted, and the verdict and judgment being for the plaintiff, the sureties appealed.

The cause was argued before BARTOL, C. J., MILLER, ALVEY, ROBINSON and IRVING, J.

*B. C. Barroll*, for the appellants.

*W. A. Hammond*, for the appellee.

IRVING, J., delivered the opinion of the Court.

This suit was brought upon the bond of Owen Wright, Albert Wright and Alexander F. Gaw, as executors of Joseph H. Wright. The appellants, who were securities, on that bond, pleaded separately from the principals, and prosecute this appeal. The equitable plaintiff is one of

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the residuary legatees under her father's will, and this suit was instituted for the purpose of recovering the plaintiff's share of his estate.

The *narr.* sets out the bond which was in the penalty of twenty thousand dollars, dated the 25th of August, A. D. 1875, and was properly conditioned for the discharge, by the executors, of their duty as such, as required by law. It alleges that this bond was duly approved by the Orphans' Court of Baltimore County, and "that Owen Wright, Albert Wright and Alexander F. Gaw undertook and assumed the office of executors of the estate of Joseph H. Wright deceased." The *narr.* then proceeds to set out the breach for which suit was brought, in the following language: "And the plaintiff now says, that the said Owen Wright, Albert Wright, and Alexander F. Gaw have not performed the conditions of said bond, and have not well and truly performed the office of executors as aforesaid, according to law, and have not in all respects discharged the duties required of them, as executors aforesaid, without any injury or damage to any person interested in the faithful performance of said office, and in particular the plaintiff now avers that large amounts of money came into the hands of the said Owen Wright, Albert Wright, and Alexander F. Gaw, as executors, which were properly due and payable by them to Elizabeth A. Vernay, as and for her share of the estate of her father, the said Joseph H. Wright, deceased; yet the said executors failed to pay over to her a large amount of said money, to wit, the sum of six hundred and fifty-two dollars, although such proceedings were had in the Orphans' Court of Baltimore County, that on the 23rd of January, A. D., 1878, an order was passed by said Orphans' Court, whereby the said executors were expressly ordered to pay over to the said Elizabeth A. Vernay, said sum of six hundred and fifty-two dollars, in full of her share of the estate. Yet the plaintiff says, that

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although the said executors had full knowledge and notice of the premises, and especially of said order of said Orphans' Court, they did not comply therewith, nor have they, nor any of them, as yet paid over to the said Elizabeth A. Vernay, or to any one on her behalf, said sum of six hundred and fifty-two dollars or any part thereof, although often requested and required so to do, and by reason thereof the said defendants became and were liable to pay said sum of six hundred and fifty-two dollars, with all interest accruing or to accrue thereon. Nevertheless the said defendants, though often requested so to do, have not yet paid the said sum or any part thereof, but have hitherto wholly neglected and refused so to do, to the damage of the plaintiff, &c."

To this declaration the appellants demurred, which demurrer was overruled, and the propriety of that ruling forms the first subject of consideration.

The main ground, upon which this demurrer was pressed, is that an action at law will not lie for a legacy, and that resort must be had to another forum. This proposition cannot be sustained. It is no longer an open question in this State. The duty of the executor is to pay a legacy; and failure to do so is a breach of the condition of his bond for the faithful discharge of his duty. For that breach, suit will lie on the bond, for the recovery of its penalty; and judgment may be had therefor, to be released on the payment of "such damages as may be assessed in respect to the particular breach assigned." *State, use of Thompson vs. Wilson*, 38 Md., 342.

Several technical objections to the *narr.* have been suggested, none of which do we think well taken. It is insisted that there is no direct assertion in the *narr.* of a will, or that the equitable plaintiff is a legatee under it; that no copy of the bond is filed with the *narr.*, and lastly, that the breach assigned, is the non-payment of a sum of money ordered by the Orphans' Court of Baltimore



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County to be paid, which order it is contended was void for want of jurisdiction to pass it.

The third section of Art. 75 of the Code of Public General Laws declares any declaration, which contains a plain statement of the cause of action or the facts necessary to constitute it, sufficient; and we think this declaration contains enough facts to sustain the action, and justify recovery. A substantial statement of the cause of action is all that is required under our system of pleading. *Crichton, et al. vs. Smith, et al.*, 34 Md., 46. This suit is upon an executor's bond, which is substantially set out in the *narr.* wherein the principal obligors are described, as executors of Joseph H. Wright; and the condition of the bond which is set out, is for the faithful discharge of duty as such executors. The giving of bond as executors necessarily presupposes a will from which authority to act as executors was derived. It was enough therefore, to set out the bond and the breach without further allegation about a will. The will would be mere matter of evidence which by the second section of Article 75 of the Code, it is not necessary to set out. The objection that there is no sufficient allegation of the fact that Elizabeth A. Vernay was entitled to anything under the will, is unsubstantial. The *narr.* directly claims she is entitled, and sues for non-payment. Whether she was or not was matter of evidence to be derived from the will. If the bond was not sufficiently set out, the appellants could have craved oyer and secured its production. It was not necessary to file a copy with the *narr.* It would only be necessary to introduce it to sustain the suit on trial as evidence. The remaining objection, that the *narr.* is founded on an order of the Orphans' Court which that Court could not pass, will be more fully treated of hereafter on the exception to the admission in evidence of that order. In this place it is only necessary to say, that its introduction into the *narr.* was unnecessary; but did not

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vitate. The suit was on the bond for the breach in not paying the plaintiff the money claimed to be due her. The Orphans' Court's order inserted in the declaration was merely evidence of such claim. There was no error in overruling the demurrer.

The appellants pleaded five pleas, the third of which was withdrawn and is not before us. The first and second were mere traversers of the allegations of the declaration. The fourth was a plea of *nul tiel* record, and applied to the proceedings in the Orphans' Court set out in the *narr.*; and the fifth was a plea of payment. Issue was joined on all. The fourth was tried by the Court. It was an immaterial issue, as the action was not really based on the order, and the record was only matter of evidence. The Court properly found, however, that there was such record, and its admissibility as evidence will be presently considered. The first bill of exceptions presents the question of the admissibility of the will of Joseph H. Wright, the defendants' testator, as evidence in support of the plaintiff's right of action. As that will made the equitable plaintiff one of the residuary legatees, it was the very foundation of her claim and right to sue for non-payment by the executors; and there was no error in admitting it.

The second bill of exceptions complains of the admission as evidence of certain proceedings in the Orphans' Court of Baltimore County, whereby it was ascertained that the appellant's principals, as executors, were indebted to the equitable plaintiff in the sum of six hundred and fifty-two dollars. The record offered consisted: 1. Of the bond of the executors. 2. The petition of the equitable plaintiff alleging errors in the executors' accounts and omissions therefrom of moneys received by them and not accounted for, and praying for the surcharging and correction thereof. 3. The citation issued by the Court for the executors. 4. The answer of the executors admit-

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ting that on full settlement they owed the equitable plaintiff \$652.00, which the petitioner had agreed to take and release them; to which answer was appended the assent of petitioner's counsel. 5. The order of the Orphans' Court directing the payment by the executors of the sum so admitted to be due to the petitioner, and directing that order "to stand in lieu of a third administration account," and directing each party to pay his own costs of that proceeding.

In the admission of this evidence there was no error. It is conceded by the appellant's counsel that the Orphans' Court had authority to act on the petition of the appellee, and to cite the executors to respond, and to coerce the return of moneys unaccounted for, and to correct the accounts. If it were not so conceded, it is nevertheless the law, and this Court has on repeated occasions so affirmed. *Wilson vs. McCarty's Executor*, p. 277, *ante*. But it is contended that the Orphans' Court did not proceed regularly; and that because the account was not *formally stated* and approved, what was done was without authority, and is therefore not evidence. The accounts of an executor or administrator have always been held *prima facie evidence* against the executor or administrator in suits between them and persons interested in the estate; but they are only *prima facie*. *Gisl's Adm'r vs. Cockey & Fendall*, 7 H. & J., 134; *Scott vs. Fox*, 14 Md., 388. That the proceedings offered in this case were *prima facie* evidence of the facts set out, at least, is clear; and more was not asked by appellee's counsel. He admitted they were liable to be controverted, that is to say, the facts they purported to establish could be disproved by competent testimony. The admission of the executors in their answer of an amount then due the plaintiff, as an admission of record to charge them was not only admissible against them, but also against the sureties; who, if they could, might have shown it was a mistake, or that it

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was a collusial admission to their prejudice. The order of the Orphans' Court, passed upon the petition, answer, and consent of the petitioner we think was also admissible to show, that the Orphans' Court, upon the matter before them, adjudged this sum due the petitioner and directed that it be paid. The form of disposing of the matter is somewhat out of the usual mode of proceeding, but we do not think it affects the question.

By the 231st section of Art. 93 of the Code of Pub. Gen. Laws the Orphans' Courts are clothed with full power to "examine, hear and decree upon all claims and demands existing between wards and their guardians, and between *legatees*, or *persons entitled* to distributive shares of an intestate's estate, and *executors* and administrators, and may enforce obedience to their decrees in the same ample manner as Courts of equity." This was a determination of the question at issue by the Court, and we cannot say it was such a departure from the usually adopted method of adjudication, as not to be received as authorized action. The Court could have given notice as required by the Code on the application of the executor, and after such notice have made a distribution. The Court evidently thought this needless, for *all the parties in interest were present* assenting to the order which was passed. The appellee and the executors were all the distributees, and what was not awarded to the appellee went to the executors. A more formal account and distribution was deemed unnecessary; and the order was passed in its stead.

The third exception embraces the prayers which were rejected. The first, third and fourth prayers present questions already disposed of in passing upon the demurrer and exceptions to evidence, and further comment is unnecessary. The second prayer asks that the administration account of executors, wherein they "crave allowance for \$205.69 to have been paid Elizabeth A. Vernay, in full of her share of the estate be declared conclusive, and that

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the plaintiff cannot recover," was correctly rejected. It ignored all the evidence of errors, and the admission of the executors of such errors and the amount due the plaintiff.

Finding no error in the several rulings of the Court, the judgment will be affirmed.

*Judgment affirmed with costs.*

(Decided 18th February, 1881.)

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STATE, use of JESSE K. HINES, INSURANCE COMMISSIONER vs. THE PRESIDENT AND DIRECTORS OF THE INSURANCE COMPANY OF NORTH AMERICA.

*Construction of the Act of 1878, ch. 106, relating to Insurance Companies—Exemption from Taxation—An Investment in City Stock, a Loan, and not a Purchase.*

An amount of gross premiums received in this State in 1879, by a foreign insurance company, doing business in this State under license, and invested in certificates of indebtedness of the Mayor and City Council of Baltimore, known as Water Stock, with the intention of holding the same for not less than two years, was exempted from taxation by the 31st sec. of the Act of 1878, ch. 106, relating to insurance companies.

The purchase of certificates of Water Stock of the Mayor and City Council of Baltimore, is a loan, within the meaning of the Act of 1878, ch. 106, sec. 31.

APPEAL from the Baltimore City Court.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., BOWIE, GRASON, MILLER, ALVEY, ROBINSON and IRVING, J.

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*Charles J. M. Gwinn, Attorney-General*, for the appellant.

*Orville Horwitz*, for the appellee.

GRASON, J., delivered the opinion of the Court.

The question presented in this case is, whether the appellee is liable for three per cent. tax on two hundred thousand dollars of its gross premiums received in this State, and invested in two bonds or certificates of the Water Stock of the City of Baltimore.

The case was tried by the Judge of the Court below, without a jury, upon an agreed statement of facts, which is set out in the record, who rendered a judgment in favor of the appellee. It is admitted that the appellee was duly incorporated by the laws of the State of Pennsylvania; that it transacts business in this State by its authorized agents and that a license for the year 1879 was granted to it by the Insurance Commissioner of Maryland, which expired on the last day of that year, and that it has continued its business from that time in this State under a license. It is also admitted that the appellee purchased the two bonds or certificates of said water stock, each for one hundred thousand dollars, out of the gross premiums received in this State in the year 1879, with the intention of holding the same for not less than two years, and that said bonds were issued to the appellee by the Mayor and City Council of Baltimore in accordance with the laws of this State, and the ordinances of said city duly enacted. It is further admitted that the tax of three per cent. on said two hundred thousand dollars so invested is due the State unless the amount of the premiums, so invested in said Water Bonds, are exempted from taxation by the provisions of the Act of 1878, chap. 106. The thirty-first section of said Act imposes a tax of one and one-half per cent. upon the gross premiums of all foreign insurance companies received in this State, less the losses, dividends and

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annuities paid in this State during the year; and provides that all premiums loaned in this State for a period not less than two years shall be exempt from such tax, and also from the retaliatory clause of said Act, which is contained in its thirty-sixth section, under which the appellee was liable to a further tax of one and one-half per cent. upon its premiums.

No question is made as to the power of the General Assembly to exempt from taxation the premiums of insurance companies doing business within this State, nor as to the proper exercise of such power, in exempting from taxation all such premiums *loaned* in this State for a period not less than two years, by the passage of the Act of 1878, ch. 106, sec. 31. But the question is, whether the acquisition of the bonds in this case was a *purchase* or a *loan* of its gross premiums received in this State. Notwithstanding that Ordinance No. 5 of 1874 of the Mayor and City Council of Baltimore authorized these bonds to be issued, in addition to any water stock theretofore authorized, and empowered the Commissioners of Finance to *sell or dispose of* them, and that said ordinance was confirmed by the General Assembly by the Act of 1874, ch. 209, we have no doubt that the delivery of the bonds by the proper city authorities and the payment of the money for them by the persons to whom they were issued and delivered constituted a *loan* and not a mere *purchase* of the bonds. The city government was empowered to introduce the water of the Gunpowder River into the city and, in order to raise money to accomplish that object, was authorized to issue and sell its bonds for such amounts as, in its discretion, it might see fit to dispose of them for. In fact this was nothing more nor less than a mode provided for borrowing money with which to do the work. The amount authorized to be thus raised was not to exceed four millions of dollars in addition to any water stock theretofore issued. These bonds, as issued, stated on their face that

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they were "Baltimore City Five Per Cent. Water Stock" and were required to be issued for sums not less than one hundred dollars each, and were made redeemable at the pleasure of the Mayor and City Council of Baltimore after the 1st day of July, 1894, and were transferable only at the office of the Register of the city, in person or by attorney, and on surrender of the certificate. When, therefore, the appellee paid to the city authorities two hundred thousand dollars of its premiums and received the two bonds or certificates of stock therefor, that sum was in effect a loan to the city for the repayment of which the bonds or certificates were taken as security. We cannot perceive in what respect such a transaction differs from a loan to an individual upon a bond or a mortgage. The transaction between the parties was the creation of an indebtedness from the city to the appellee to be paid at any time after first day of July, 1894, and this appears upon the face of the certificates. It appears in the statement of facts that the appellee purchased these two certificates of Water Stock in this State, and it must, therefore, be presumed that they were purchased directly from the city, or from some person in this State, to whom they were originally issued; and if they were purchased by the appellee from either the one or the other we are clearly of opinion that they are exempt from taxation by the terms of the Act of 1878.

*Judgment affirmed.*

(Decided 18th February, 1881.)



HENRY LE BRUN *vs.* JULIA H. LE BRUN, by her  
next friend, JOHN T. RANDALL.

*Powers of a Court of Equity to declare a Marriage a Nullity—  
Art. 60, sec. 8, of the Code—1864, ch. 106—Presumption in  
favor of the Validity of a Marriage de facto—Proof  
required in a proceeding to have a Second Marriage declared  
a Nullity, the First Subsisting.*

A Court of equity is empowered to declare a marriage, procured by abduction, terror, fraud or duress, a nullity, by virtue of its general jurisdiction in matters of fraud affecting contracts. By Art. 60, sec. 8. of the Code, a Court of equity is authorized to declare a marriage null and void, where it is within the prohibited degrees of kindred or affinity, or where there is a first marriage subsisting at the time of the second. In such cases, the parties themselves are made competent witnesses, by the Act of 1864, ch. 109.

Where a marriage *de facto* is followed by cohabitation and issue, there is not only the ordinary presumption in favor of its validity, but, being assailed upon the ground that a former marriage of the woman is still subsisting, the crime of bigamy on her part is involved in the charge, and the law always presumes against the commission of crime and in favor of innocence. No decree can be passed in such a case, unless the fact that the former husband was alive at the date of the second marriage, is clearly established by such proof as all the authorities, upon the soundest reasons, indicate and require.

It would be an alarming doctrine to hold that an actual ceremonial marriage could be made void by the mere confession or declaration of one of the parties to it, that she had another husband living at the time; especially in a case where the fact that the first husband was alive at the date of the ceremonial marriage, if true, could by the use of proper and reasonable diligence be established by direct and conclusive proof.

The testimony of a witness on behalf of a second husband, in a proceeding by him to have the ceremonial of marriage with the woman declared a nullity, as to a letter, not produced in evidence

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and not proven to have been lost or destroyed, or its absence otherwise satisfactorily accounted for, purporting to be from the first husband, received by the witness in answer to one written by him after the second marriage, was properly excluded; as was also a letter purporting to be from the first husband, addressed to his daughter, after the second marriage, the genuineness and authenticity of which letter, and the identity of the person who dictated it with the first husband, (who could not write,) not being established.

APPEAL from the Circuit Court for Baltimore County, in Equity.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., MILLER, ALVEY and IRVING, J.

*George Hawkins Williams*, for the appellant.

In a suit to declare a marriage a nullity by reason that one of the parties at the time of the second ceremonial had been previously legally married, and the marriage not dissolved by death or operation of law, though such a sentence is not necessary, declaratory only that a void thing is absolutely void, yet it is a duty which the Court owes the public so to declare the situation of the parties. *Shelford on Marriage*, marg. p. 565; *Hayes vs. Watts*, 3 *Phill. R.*, 44.

And such interest of the public is greater in cases of absolutely void marriages than in those only voidable; and the sentence of the Court in such cases is not discretionary on its part, but obligatory. 3 *Phillimore R.*, 161; *Pertries vs. Tondeau*, 1 *Hagg. Cons. R.*, 137, 138.

And such sentences, touching the validity of a marriage, never become final judgments, and are always open to revision and reversal; and from their very nature there can be, as to them, no such thing as *res adjudicata*, and are

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always impeachable for fraud. *Poynter on Marriage*, marg. p. 157; *Shelford on Marriage*, marg. p. 474; *Duchess of Kingston's Case*, 20 *Howell St. Trials*.

Here a Court had decreed a divorce *a mensa et thoro*. If no marriage and a void ceremonial, such a decree was a farce. The knowledge in such case is never equal; the woman here, absolutely knew—the man had heard and suspected; gossip averred it, but he was unable to prove it—he broke down on his cross-bill. Subsequently he became able to prove. Is he then to be told, it is *res adjudicata*, by the woman who perpetrated the fraud, and did know?

Is a Court to let a decree stand, that by authority, and the very reason of the matter should be always open? And is a man to be deemed married only by the operation of a decree of divorce *a mensa et thoro*, a partial dissolution only of the myth, in the face of overwhelming proof that he never in fact was married at all? To sustain the order of the Court below, the appellee is constrained to argue in behalf of so untenable a position, and that as to the very Court in which the fraud was perpetrated, not being impeached collaterally, but by a direct proceeding in the Court itself which passed the decree.

If this be not the true view, then a man can be validly married to a culprit bigamist, full of guilty knowledge on her part, by the doctrine of estoppel, under the pretext of its being *res adjudicata*.

*Rufus W. Applegarth*, for the appellee.

In considering this case it is important to bear in mind that the appellant, in order to succeed, must negative the presumption of law, that, after an absence of seven years unheard from, the first husband is dead. *Tilly vs. Tilly*, 2 *Bl.*, 444; 2 *Best on Evidence*, sec. 409.

And negative also the further presumption of law in favor of the validity of the second marriage. *Piers vs. Piers*, 2 *H. of L. Cases*, 380.

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Courts do not annul marriages and bastardize innocent children upon the admissions of defendant, nor of both the parties. *Montgomery vs. Montgomery*, 3 *Barbour Ch. R.*, 134; *Cope vs. Cope*, 1st *M. & Robb*, 269; 1 *Q. B.*, 450, 452; *L. R.*, 10 *Eq.*, 41; 33 *Law Library*, 230.

It has been held by an unbroken line of decisions that in suits of this character it is a clear rule, that strict proof of the identity of the parties is requisite, and that the identity must be proved by other testimony than that of the parties themselves, that is, by witnesses who can speak to the facts from their own personal knowledge. *Page's Law of Divorce*, 86; *Shelford on M. & Divorce*, 33 *Law Library*; *Searle vs. Price*, 2 *Haggard*, 524; *Legge vs. Legge*, 9 *Jurist*, 144; *Bayard vs. Morphen*, 2 *Philli. R.*, 321; *Williams vs. Williams*, 2 *Haggard*, 418.

To sustain the bill, it was necessary to prove the existence of Randall at the time of the second marriage. *Piers vs. Piers*, 2 *H. of L. Cases*, 380; *Morris vs. Davis*, 5 *Clork & Fin.*, 265; *Rex vs. Twynning*, 2 *B. & Ald.*, 386.

The cross-bill of appellant having been dismissed, in 1874, and a final decree divorcing the parties *a mensa et thoro* having been passed, he cannot be heard in this case to deny the validity of the marriage. The grantee in the deed sought to be annulled should have been made a party. *Chesapeake and Ohio Canal Co. vs. Gittings*, 26 *Md.*, 276; *Jenkins & Hewes vs. Hay*, 28 *Md.*, 547; *Ward vs. Hollins*, 14 *Md.*, 158.

MILLER, J., delivered the opinion of the Court.

The bill in this case filed in February, 1879, prays that a ceremonial of marriage between the parties may be declared and adjudged a nullity, upon the ground that the defendant was the lawful wife of another man who was living at the time this ceremony was performed. It charges, in substance, that on or about the 7th of March, 1849, the said Julia was lawfully married to Charles

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Randall, a Prussian, as complainant believes, but then a resident of Baltimore City; that after living together for several years, as man and wife, Randall abandoned her and left the city for parts unknown to complainant; that subsequently, on the 25th of April, 1866, the said Julia, professing to be a single woman, without disclosing to him that Randall was, to her knowledge, then living, went through the ceremonial of a marriage with complainant; that at the time she not only knew that Randall was alive, but subsequent to the ceremony and without complainant's knowledge, she corresponded with him, and received from him letters and money; that in such ignorance, complainant, for some years, continued to live with her as her husband, and during this period she bore two children of whom he is the reputed father; that some years since she left his house and they have ever since lived apart; that still professing to be his wife, she filed a bill for divorce *a mensa et thoro* and for alimony, on which, in November, 1874, a decree for such divorce was passed, and by a subsequent decree complainant was directed to execute a deed of certain property to a trustee, to secure to her, during her life, the annual payment of \$183.50 as alimony, which he did, and by common consent another deed, as a substitute therefor, was executed in November, 1875; that throughout all these proceedings complainant well supposed she was his lawful wife, and, as such, entitled to the alimony provided by the deed, but he charges that during all this time she well knew that her true and lawful husband was living, and continued to receive letters and remittances from him long after her pretended marriage with complainant, of all which she studiously kept him in total ignorance. He further charges that such acts and conduct on her part were a deliberate fraud upon his rights, and the application for such divorce, a perversion and mockery of a Court of justice, and the decree, and the deeds executed thereunder,

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are as much nullities as the ceremonial of marriage, and should be so declared; that said Randall, so far as known, has never returned to this State since the abandonment of his wife, and complainant is not able to say whether he is now living or dead, but not having been heard from for a long time, he charges that he is now dead.

In her answer the respondent admits her marriage with the complainant in April, 1866, that they have two children, one of whom is now twelve, and the other seven years of age, and avers that in consequence of his cruel treatment she was forced to leave him, and shortly thereafter, in August, 1874, filed a bill for a divorce *a mensa et thoro*, on the ground of his cruel treatment: that he answered that bill under oath, and alleged as a defence thereto, that her former husband, Charles Randall, was still alive, that she had corresponded with and received money from him, that his marriage with her was null and void, and subsequently filed a cross-bill in the same cause, praying to have the marriage annulled upon the same grounds alleged in his present bill; that in that cause a decree was passed on the 2nd of November, 1874, granting the divorce prayed, dismissing the cross-bill and granting alimony as stated, that he executed the deeds referred to, providing for her alimony, and as late as January, 1877, she united with him in a deed conveying part of his property; that in all these proceedings he voluntarily acknowledged her as his lawful wife, and she avers that by the decree in the former case dismissing his cross-bill, and by the execution of the deeds referred to, he is precluded from coming again into a Court of equity, seeking the same relief upon the same grounds. She admits that in March, 1849, she married Charles Randall, and lived with him as his wife until October, 1856, when she avers he abandoned her and shipped as a seaman on board a vessel bound for Liverpool, and since that time she has never seen or heard from him; that at the time of her

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marriage with complainant she had neither heard from, or seen her former husband for over nine years, and had every reason to presume him dead, and she therefore avers that he was dead; that before her marriage with him she informed complainant of all these facts, and at the time of the marriage he had full knowledge of them. She further avers that Charles Randall was illiterate and could not read manuscript or write; that in 1862 or 1863, during the late civil war, a man of his name was reported killed on a United States' gunboat on the Mississippi river, whom she believed to be her former husband. She denies that after her marriage with complainant she corresponded with, or received either letters or money from Randall, either with or without complainant's knowledge, and she denies *in toto* every allegation of the bill to that effect. She denies that she ever knew that Randall was alive after he abandoned her, or that she in any way so acted as to perpetrate a fraud on the rights of the complainant, and avers that he is her true and lawful husband; that the provisions made for her in the trust deeds are barely sufficient for her support, coupled with the scant proceeds of her daily labor, rendered necessary by his cruel treatment, compelling her to live apart from him, and ought in all good conscience to be upheld, otherwise she will be left to perish in her declining years and weak health.

After general replication to the answer, testimony was taken directed mainly to the question whether the first husband was alive at the date of the second marriage.

Before considering the testimony it is well to notice the source of authority, and the principles upon which the Courts proceed in such cases. Suits for nullity of marriage have been very rare in this State, but the power of a Court of equity to declare a marriage null and void, when a proper case is made out, cannot be questioned. The authority of the Court, however, to act in such cases, is not derived from the powers conferred by the divorce laws, although a

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divorce *a vinculo* may be decreed upon some of the same grounds upon which a marriage may be declared a nullity. *Code, Art. 16, sec. 25.* If the marriage be procured by abduction, terror, fraud, or duress, the Court, in declaring it a nullity, acts in virtue of its general jurisdiction in matters of fraud affecting contracts, and by the marriage Act, (*Code, Art. 60, sec. 8,*) express authority is given to the Courts to inquire into, hear and determine the validity of any marriage, and may declare any marriage within the prohibited degrees of kindred or affinity, "or any second marriage, the first subsisting," null and void. These are the two sources of jurisdiction, and if in the present case it be derived from either, it is plain the parties themselves are made competent witnesses by the Evidence Act of 1864, ch. 109. Such was the judgment of this Court in the unreported case of *Hoffman vs. Lorenz*, decided in June, 1873, (38 *Md.*, xi.) But while the Courts are thus clothed with jurisdiction, the peculiar nature of the subject to be dealt with, requires that the power should be exercised with extreme caution, and only where the allegations of the bill are sustained by clear, distinct and satisfactory evidence. This position is sustained by an unbroken current of authority. Marriage has been considered, among all civilized nations, as the most important contract into which individuals can enter, as the *parent*, not the *child* of civil society. The great basis of human society throughout the civilized world, is founded on marriages and legitimate offspring; and where an existing marriage is proved, it is not to be exposed to the danger of being set aside by any species of collusion, or by the mere declarations of either of the parties, and should only be brought in question upon the most undisputed proofs. *Shelford on Marriage and Divorce*, 573; *Fornhill vs. Murray*, 1 *Bland*, 481; *Piers vs. Piers*, 2 *House of Lords Cases*, 331; *Gaines vs. Relf*, 12 *How.*, 472. Where, as in the present case, a marriage *de facto* is fol-



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lowed by cohabitation and issue, there is not only the ordinary presumption in favor of its validity, but, being assailed upon the ground that a former marriage of the woman is still subsisting, the crime of bigamy on her part is involved in the charge, and the law always presumes against the commission of crime and in favor of innocence, *Jones vs. Jones*, 48 Md., 391; *Rex vs. Twynning*, 2 Barn. & Ald., 386. We cannot, therefore, pass a decree in this case, which will bastardize the issue and impute crime to the woman, unless the fact that her former husband was alive, at the date of her second marriage, is clearly established by such proof as all the authorities upon the soundest of reasons, indicate and require.

How then stands the proof in the record upon this question? The first marriage was in March, 1849, and the second in April, 1866, as stated in the bill and answer. There was, therefore, an interval of seventeen years between the two, and this is followed by the lapse of nearly thirteen years before the present bill was filed. It is also proved that the woman had issue, who are still living, by each husband. At the time of her marriage to Randall, he was a common sailor, and neither of them could write or read writing. While they lived together, and before he deserted her, he made several voyages, returning regularly to his home and family in Baltimore. During his absence on these voyages, there was a correspondence between them, the letters being written and read by friends or third parties. After this had continued for some seven years, she testifies that in October, 1856, he shipped as a seaman before the mast, on a vessel belonging to Boston, bound to Liverpool, that in February, 1857, she received a letter from him from Liverpool, containing a remittance of \$20, and since that time she has never seen him or heard from him. It is proved he never afterwards returned to Baltimore or to the State, and no witness who knew him, and could identify him, proves that he ever

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saw him for a long time before, or ever after the date of the second marriage. In fact no witness proves he ever saw him after he left Baltimore in the fall of 1856, and no attempt has been made, even with the assistance of the letter of the 13th of April, 1874, (which will be presently noticed more particularly,) to trace him from 1856 onwards, or to obtain from him, if he was then alive, information which he could readily have given, establishing beyond dispute his identity as the living husband of the appellee. The absence of such testimony, if not fatal to the complainant's case, has a most important bearing upon it. In *Shelford on Marriage and Divorce*, 230, it is said, "In a suit for nullity of marriage, by reason of a former marriage, strict proof of the identity of the parties is requisite. It is a clear rule that the identity must be proved by other testimony than that of the parties themselves, that is, by witnesses who can speak to the facts from their own personal knowledge." The witness, *Mrs. Ashcroft*, who appears to have read the letters, and conducted the correspondence on the part of the appellee with Randall, testifies to the effect that such letters were received and answered after respondent's marriage with Le Brun, and that she admitted she knew that Randall was then alive. Her testimony, as well as that of all the witnesses, we have examined very carefully, and all the comment that need be made upon it, is, that some important discrepancies have been brought out on cross-examination, and most of this correspondence is shown to have taken place long prior to April, 1866, if not prior to February, 1857. The memorandum made by *Mr. Boorman*, as to what the appellee said in his office on the 2nd of November, 1874, is in many respects confessedly inaccurate, and wholly inconsistent with the conceded facts of the case. It is apparent that both he and *Mr. Dawson* must have misunderstood, in many important particulars, what the appellee then stated, and their testimony, apart

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from the memorandum, only goes to prove an *admission* or *confession* by the appellee that she knew Randall was alive after she married Le Brun. Such also in the main, is the result of the testimony of *Mrs. Ashcroft* and her daughter, of *Miss Powers* and of *Joseph H. Le Brun*, a son of the complainant. The appellee denies that she ever made such admissions or confessions, but assuming that she did, we must apply to them, and to all testimony of like character, what was said by the Supreme Court in *Gaines vs. Relf*, that it would be an alarming doctrine to hold that an actual ceremonial marriage could be made void by the mere confession or declaration of one of the parties to it that he had another wife living at the time. The rule adopted as a guard against imposition and the danger of a marriage being set aside by collusion between the parties, precludes us from placing reliance upon such testimony, especially in a case where the fact that Randall was alive at the time, if indeed it was a fact as the bill charges, could, by the use of proper and reasonable diligence, have been established by direct and conclusive proof. *Mr. Dawson* further testifies to the effect, that after her bill for divorce was filed by the appellee, Le Brun informed him that Randall was living, and was a seaman in the United States Naval service, but where stationed he could not tell, and that witness thereupon, with a view of procuring his testimony, wrote a letter to Randall, and sent it to the Navy Department at Washington, with a request that it should be forwarded to him at whatever station he might be; that several weeks thereafter he received a reply, purporting to come from Randall, on board the United States ship "Independence," stationed at San Francisco, and that in this letter Randall expressed his indignation that his wife should attempt to contract a second marriage while he was living and contributing to her support. But to the admissibility of all this, the appellee has filed an exception, which must unquestion-

ably be sustained, and the testimony excluded from the case. The letter itself, purporting to be from Randall, is not produced, nor is it proven to have been lost or destroyed, nor is its absence otherwise satisfactorily accounted for. *Mr. Dawson* says he gave the letter to the complainant after the divorce suit had been settled, but the complainant was not examined as a witness in the case for the purpose of proving what became of this letter, nor indeed for any other purpose.

But the strongest piece of evidence in support of the bill, is the letter of the 13th of April, 1874, already referred to. That letter purports to be from Charles Randall on board "United States Receiving Ship, Independence, Navy Yard, Mare Island, California," and is addressed to his daughter, "Miss Isabel Randall, Eastern Avenue, Baltimore." In her testimony the appellee admits that this letter was advertised in the papers, that she went to the Post Office, got it, and delivered it to her daughter who read it; but she says she did not believe it came from her first husband, because she believed him to be dead, had never heard from since 1857, and had, in 1862 or 1863, read in the newspapers that Charles Randall of Baltimore, was killed in an engagement up the Mississippi river with one of the rebel gunboats. The daughter testifies that she received the letter and read it, but regarded it of such little importance that she paid no attention to it, as she always supposed that her father was dead, and had been so informed by her mother. There is certainly in the letter itself intrinsic evidence that the writer had obtained some information of family matters which Randall would be likely to know. Among other things the daughter is informed by it, that her father had just ascertained her address, and hopes she will write to him as soon as she receives this letter; that for his having staid away from home so long he says her mother is entirely to blame, and it further says,

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“ Please give my respects to Mrs. Robinson, your aunt, and tell her that I am in good health.” The Mrs. Robinson referred to was the aunt of the daughter who died fourteen years before. But it is conceded the letter was not in fact written by Charles Randall himself, and if written by another at his request and dictation, no effort has been made to prove or discover who the writer was, or from whom he obtained the information it contains. It appears in the record without the envelope showing from whence it came. It was discovered and taken possession of by the complainant's son, the witness in this case, who showed it to his father while the divorce suit was pending, and yet it was not used in the prosecution of his cross-bill in that case, nor, so far as the record discloses, was any thing done or attempted towards verifying its genuineness and authenticity, or establishing the identity of the party who dictated it with the appellee's first husband. In our opinion this letter thus produced, without other proof that the party writing or dictating it was in fact the woman's first husband, ought not to be made the foundation of a decree annulling her second marriage, and bastardizing the issue of that marriage. The surgeon's certificate received from the Navy Department, assuming it to be admissible in evidence, tends, as it seems to us, to weaken rather than strengthen the appellant's case. If admissible at all we must receive it as it stands, and take it for what it says. From this certificate it appears that Charles *Randalls*, “ who was a landsman in the United States Navy attached to the United States Receiving Ship, Independence, at Mare Island, California,” died on the 9th of June, 1877, and that he “ entered the United States Naval Service at Mare Island, California, on the 8th day of June, in the year 1877.” The difference in the name, the fact that he was enlisted and described as a *landsman*, and that he entered the service on the 8th of June, 1877, are all facts strongly tending to show that

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this man could not have been the Charles Randall, who married the appellee in 1849, and who was then, and for all the years afterwards, so far as he can be traced by the undisputed proof in the case, continued to be a *seaman* and a *sailor*.

We are all very clearly of opinion a case for annulling the marriage has not been made out by the requisite proof, and this dispenses with the necessity of considering the question whether the failure of the complainant to prosecute his cross-bill in the divorce proceedings, and the decree dismissing that bill, constitute a bar to the maintenance of his present suit.

*Decree affirmed.*

(Decided 18th February, 1881.)

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Appeal of ELMER HEWITT, JR., in the Matter of the  
Estate of ELMER HEWITT, SR.

*Construction of a Deed made by a Man to a Woman by whom he had had children, whom he afterwards married—Inebriety, Fraud, Misrepresentation and Undue Influence—Instructions to Conveyancer—Mistake—Laches—Practice in Equity—Proceeding to have a Trustee appointed, under Art. 16, sec. 66, of the Code.*

By deed of the 15th of May, 1869, E. H., Jr., in consideration of the sum of five dollars "doth grant and assign unto A. during her natural life" certain leasehold and other property, and "also all his interest in the estate of Mrs. G. H. who holds during her life, and after her death it becomes the absolute estate of the heirs-at-law, the said E. H. Jr. will be entitled to one-third interest in said estate;" *habendum*, "unto the said A. during her natural life, and from and immediately after her death to have and to hold all of said property and estate before mentioned, unto the

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children begotten of the bodies of said E. H., Jr. and A., their heirs, personal representatives and assigns absolutely, share and share alike, as tenants in common, subject, nevertheless, to the life estate of the said E. H. Jr., in all of said property." Then followed covenants against incumbrances, and for further assurance. At the time of the execution of this deed, E. H. Jr., and A. were living together as man and wife and had three children, and subsequently married. E. H. Jr., had purchased from two of the seven devisees under the will of E. H. Sr., their father, their interest in property held by Mrs. G. H., their mother, for life under the will, which, upon her death, the will directed should be sold, and the proceeds divided among the seven children. In a proceeding by parties in interest by petition under Art. 16, sec. 66 of the Code, praying for the appointment of a trustee to sell the property of E. H. Sr., as directed by his will, and for the distribution of the proceeds among the parties entitled, it was HELD:

- 1st. That the deed embraced E. H., Jr.'s interest in the property in which his mother Mrs. G. H. had a life estate; and that the deed gave a life estate to A. in the property granted and assigned, and after her death an absolute estate in remainder to the children, subject to the life estate of their father, in case he should survive their mother, and that two-sevenths of the proceeds from the sale should be so applied.
- 2nd. That the deed was valid, there being no proof that E. H., Jr., was at the time of its execution in such a state of drunkenness, as alleged by him, as not to know what he was doing, or the consequences of his own acts; and that there was no proof that it was procured by fraud, misrepresentation and undue influence; and that the fact that he was living with A., as his wife, at the time of its execution, did not raise the presumption of fraud and undue influence on the part of A.
- 3rd. That, though the deed was not in precise conformity with what it appeared, E. H., Jr.'s instructions were, yet no such mistake was made out by proof, as would enable a Court of equity to grant relief to E. H., Jr., on that ground; and that even were he entitled to relief, he had lost the right to it by *laches*, ten years having elapsed after the execution and recording of the deed, before E. H. Jr., took steps in the matter.
- 4th. That the deed being filed in the cause as an exhibit with the petition, it was not necessary that A. and the children (minors) should have presented their claim by next friends, the Court being

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required by the Code to see that the proceeds of sale were applied to the parties entitled.

APPEAL from the Circuit Court of Baltimore City.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., MILLER, ROBINSON and IRVING, J.

*Hutton L. Bouldin*, for the appellant.

*Edward Duffy*, for the appellees.

MILLER, J., delivered the opinion of the Court.

Under the agreement of parties, made in this Court, the only material questions presented by this appeal are the construction and validity of the deed of the 15th of May, 1869, executed by the appellant, Elmer Hewitt, Jr., to Amelia Smith, whom he subsequently married. The questions arise in this way: Elmer Hewitt, Sr. died in 1856, leaving a will by which he directed all his property to be sold by his executors and to be divided by them among seven of his children. In a part of the property his wife, Grace Hewitt, had a life estate, and the sale and division of this he directed should be made after her death. The executors named in the will refused to act and renounced the trust. Letters of administration with the will annexed were thereupon granted to the appellant and the widow. The appellant was a child of the testator but not one of the seven among whom the property was to be divided, but after his father's death he purchased their shares from two of the seven. The widow died in September, 1878, and the appellant, the surviving administrator, refused to sell the property or to execute the trusts of the will. The other parties in interest, thereupon, in Decem-



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ber, 1878, filed a petition in the Circuit Court of Baltimore City, under section 66 of Article 16 of the Code, praying for the appointment of a trustee to make the sale and for the application of the proceeds to the parties entitled. This petition sets out conveyances of their interests by several of the parties, and among them the deed by the appellant of the 15th of May, 1869, a certified copy of which is filed as an exhibit. The appellant was also made a defendant, and in his answer, after admitting the other averments of the petition, he denies that this deed embraces his two-sevenths interest in this property, and he also denies its validity upon grounds which will be hereafter stated. A decree was then passed appointing a trustee to make the sale, and the same was duly made and ratified. The case was then referred to the auditor with directions to take proof as to who are the persons entitled to the proceeds, and to state an account making distribution accordingly. Much of the testimony so taken relates to the validity of this deed. The Court below held it to be valid, and that under it Amelia Hewitt, (formerly Smith,) the appellant's wife, took a life estate with remainder in fee to their children, subject to the life estate of the appellant in case he survived her, and the appellant's share of the proceeds was distributed accordingly. From the order ratifying that distribution this appeal is taken.

By this deed Elmer Hewitt, Jr., the grantor, in consideration of the sum of five dollars "doth grant and assign unto Amelia Smith, during her natural life," certain described leasehold and other property not involved in this case, and "also all his *interest* in the estate of Mrs. Grace Hewitt, *who holds during her life*, and, after her death, it becomes the absolute estate of the heirs-at-law, the said Elmer Hewitt, Jr., will be entitled to one-third interest in said estate," *habendum*, "unto the said Amelia Smith during her natural life, and from and immediately

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after her death to have and to hold all of said property and estate before mentioned, unto the children begotten of the bodies of the said Elmer Hewitt, Jr., and Amelia Smith, their heirs, personal representatives and assigns, absolutely, share and share alike, as tenants in common, *subject* nevertheless to the life estate of the said Elmer Hewitt, Jr., in all of said property." Then follow covenants against incumbrances, and for further assurance.

1st. This conveyance appears to have been drawn with very little skill, but we have no great difficulty as to its construction and effect. It is unquestionably a deed *inter vivos* and not a will, and we think it is equally clear that it embraces the grantor's interest in this property. The descriptive part above quoted, in our opinion, plainly refers to, and is quite sufficient to cover, all the interest the grantor had acquired by purchase in the property in which his mother held a life estate, and which upon her death his father's will had directed should be divided among seven of his children. His obvious intent, as gathered from these words, was to convey all his interest in the estate held by his mother for her life, and there is no proof that he had any other property to which this language could be referred. To exclude the property in question from the operation of the deed would render this language wholly inoperative and infringe the rule that every deed shall be taken most strongly against the grantor. As to the estates it creates we have no doubt. That it gives in the first place a life estate to Amelia Smith is beyond dispute. Then in the *habendum clause*, an absolute estate, after her death, is given to the children subject to a life estate in the grantor. In other words the children take under this clause an absolute estate in remainder subject to the life estate of their father in case he should survive their mother. It is no objection to the estate in remainder to the children that they are not named in the premises, for it is well established and familiar law

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that a person not named in the premises, or a stranger to the deed, may take in remainder by the *habendum*. *Cruise's Digest*, Title 32, ch. 21, sec. 69; 3 *Wash. on Real Prop.*, 438, sec. 62.

2nd. But the validity of the deed is attacked upon several grounds, which we must now consider. In the first place, the appellant alleges he was *non compos* when it was executed, by reason of excessive indulgence in intoxicating liquors. To sustain this objection it is incumbent upon him to produce clear and satisfactory proof that he was at the time in such a state of drunkenness as not to know what he was doing, or the consequences of his own acts. *Johns vs. Fritchey*, 39 *Md.*, 258. We have carefully examined the testimony on this subject, and are of opinion that it fails to make out such a case as would justify the annulment of the deed on this ground. It is next said it was procured by fraud, misrepresentation and undue influence. This, also, is purely a question of fact to be determined by the testimony in the record. The proof shows that, at the time this deed was executed, he was not married to Amelia Smith, but that they were then living together as man and wife, and had so lived for many years; that he had three children by her, who were living at the date of the deed, and that they were lawfully married within one or two years thereafter. There is no proof whatever that any fraud was practiced, or misrepresentation made to, or undue influence in fact exerted upon him, by this woman, who afterwards became his lawful wife, to induce him to execute this instrument. All that is said upon this subject by the appellant himself is that, during his sickness, she was anxious for him to make a deed or will—he does not recollect which; that his mother and nephew were also anxious he should provide for his offspring in case of his death; that his mother advised him to execute the paper, for the benefit of the woman and the children in the event of his death, but did not insist upon

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it, as she knew he was stubborn, and would do nothing if she insisted. But it is argued that the immoral relation in which the parties stood at the time raises the presumption of fraud and undue influence on the part of the woman. The case of *Leighton vs. Orr*, 44 Iowa, 679, mainly relied on to sustain this position, differs widely in all its facts and circumstances from this. There a crafty and designing married woman, who was a notorious spiritualist and professed to be a spiritualistic medium, lived in adulterous intercourse with a man over whom she acquired great influence, and whom she controlled in a large degree in the management of his business. She received from him shortly before his death deeds of gift of a large portion of his property for her sole use and benefit, and these were set aside by the Court. But in this case the intercourse was not adulterous. The parties lived together as man and wife, and children were born to them, who, by the subsequent marriage of their parents, were under our laws made legitimate. If any such presumption as that contended for could arise from the relation existing between these parties before marriage, it is entirely repelled by the facts of the case as shown by the proof.

The character and conduct of the appellant, as disclosed by the testimony, his treatment of this woman, as well before and after the execution of the deed, as the marriage make it impossible for us to believe that she ever acquired any influence over him, or in fact exerted any towards the procurement of this conveyance.

Lastly, it is objected that the deed was not drawn by the conveyancer in accordance with the instructions he received, and it was therefore executed in mistake. This presents the only question of any difficulty in the case. It seems from the testimony of the appellant that he wanted the deed so drawn that he could have the power during his life of selling the whole property, and that he would not have signed it if he had not supposed, and if it

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had not been represented to him, that such was its effect. The testimony of the conveyancer is very confused as to what instructions he actually received, and why he drew it in the form in which it appears. The wife testifies that, shortly before the deed was prepared, the appellant said to her: "I had better deed my property to you and the children, so I can have a life estate to sell if I want to; if I don't I shall sell the property, and squander the money away for whiskey;" that he then sent for the conveyancer, and, when he came, he told him he wanted the deed "drawn so that he could have a life estate in the property, and so that at his death it would come to me, and at my death to the children;" that the next day, when the conveyancer brought the deed, *he read it over to him*, and asked him if he was satisfied, to which he replied, "I am: you drew it just as I wanted it. I can sell my life estate at any time." It is true that the deed, as it stands, is not in precise conformity with what this witness states the instructions to have been; but we are by no means satisfied, from all the testimony in the record, that any mistake has been made out by such clear and satisfactory proof as the authorities require in order to enable a Court of equity to grant relief on this ground. *Groff vs. Rohrer*, 35 Md., 327; *Kearney vs. Sasscer*, 37 Md., 264. But should it be conceded the appellant would have been entitled to such relief if he had sought it in due time and with reasonable diligence, we are all of opinion he has lost the right by *laches*. The deed was executed on the 15th and was recorded on the 17th of May, 1869. The proof shows that within two weeks thereafter he went to the Record Office, read it, and then went to his conveyancer, who informed him as to its effect; that shortly afterwards he told a friend he had conveyed his property, and that it was fixed all right; that he kept the original deed in his trunk, and could examine it when he pleased. With this full knowledge of its contents and

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effect he made no objection, complained of no mistake, and took no steps either to have it vacated or reformed until the filing of his answer in this case—a period of nearly ten years, and during all this time he was laboring under no legal or mental disability. Such delay and acquiescence, under such circumstances, must be a bar to relief on the ground of mistake. In *Beard vs. Hubble*, 9 *Gill*, 431, it was said that a party who is injured by a mistake should take steps promptly to get relief, and in that case a delay of less than eight years, with knowledge of the facts, was held to be gross *laches*.

3rd. A question of equity practice has also been relied on. The appellant contends that the proceedings subsequent to the decree must be the same as in a creditors' suit, and that his wife and his children, who are minors, should have presented their claim by next friends, and could not present it in their own right. But the answer to this is, that the deed was filed in the cause as an exhibit with the petition, and the Court is required, by the section of the Code under which the decree was passed, to see that the proceeds of sale were applied to the parties entitled, or the purposes intended by the will. With this deed thus in the cause, and thus brought to its attention, both by the petition and the answer of the appellant, the Court was bound to recognize its provisions, and not allow the proceeds to which he would otherwise be entitled to be distributed to the appellant, unless he could get rid of his own conveyance.

*Order affirmed, and  
cause remanded.*

(Decided 18th February, 1881.)

FREDERICK BURGER *vs.* MAX GREIF. ALEXANDER Y.  
DOLFIELD AND FREDERICK C. COOK, Trustee *vs.*  
MAX GREIF.

*Marshalling of Securities—Right of Mortgagor to sell any of the Parcels of Real Estate aliened subject to a Mortgage—Contribution when Mortgage Debt paid by One of the Purchasers of the Parcels.*

On the 15th December, 1874, C. L. H. and others conveyed to J. F. two leasehold lots in Baltimore City. On the same day J. F. mortgaged both lots to C. L. H. to secure \$2000. On the 28th December, 1874, J. F. sub-leased a part of the second lot to F. B. On the 14th September, 1876, J. F. assigned all his interest in both lots to G., subject to the mortgage for \$2000, and another mortgage of even date given by J. F. to a building association. On the 24th April, 1878, G. mortgaged the first lot to M. G. and L. G. to secure \$1500. On the 5th November, 1878, G. assigned all his interest in both lots to B. F., subject to the mortgage for \$2000. The mortgage to M. G. and L. G. was foreclosed, M. G. became the purchaser at \$1150, and a deed for that lot was executed to him, on the 29th January, 1879, by the trustee who made the sale. At the time of sale, the trustee stated, that the lot was sold subject to the effect and operation of a first mortgage for \$2000. It was afterwards shown that this lot was worth from \$3000 to \$3500. On the 10th February, 1879, C. L. H. assigned his mortgage on both lots and the mortgage note to D. On the 11th February, 1879, B. F. conveyed the second lot to F. B. On the 7th March, 1879, D. obtained a decree for the sale of all the mortgaged property described in the mortgage to C. L. H., and a trustee was appointed to make the sale. After the property was advertised, M. G. offered to pay the mortgage debt if D. would assign the mortgage for \$2000 to him. This offer D. and the trustee declined. On the 15th March, 1879, M. G. filed his bill against D., F. B. and the trustee, charging among other things, that he was entitled to an assignment of the mortgage and decree after paying the mortgage debt, and praying that if sold, the lots should be sold in the order designated in his bill, and that the sale of the property of M. G. under D's decree should be enjoined until a sale of the other parts of said property should have first been made

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The Court ordered the two cases to be consolidated, and that, on payment into Court of the mortgage debt, interest and costs, the trustee be enjoined from making sale of the property. In this proceeding it was HELD:

- 1st. That all the purchasers of the two lots having bought subject to the mortgage for \$2000, and the obligation of each to pay the mortgage forming part of the consideration of his purchase, they all stood upon equal footing and the mortgagee's assignee D. had the right to sell any part he might think proper for the payment of his debt; and that the party whose property might be sold, had a right to a proceeding to compel contribution from the other purchasers.
- 2nd. That M. G. had no right to an assignment of the mortgage and decree, on payment of the mortgage debt, interest and costs; but that such payment would entitle him to have contribution from the other parties, who had bought parts of the mortgaged premises.

APPEALS from the Circuit Court of Baltimore City.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., GRASON, MILLER, ALVEY, ROBINSON and IRVING, J.

*F. C. Cook* and *O. F. Bump*, for the appellants.

This case arises under the law in regard to the order of sale under a lien where there have been subsequent alienations. The principles of that law will be readily seen upon examining the facts of *Gill vs. Lyon*, 1 Johns. Ch., 447. See *Hartley vs. Flaherty*, *Lloyd & Gooldtemp Plunket*, 208; *Welch vs. Beers*, 8 Allen, 151.

It is manifest that the right to a particular order of sale arises from the obligation which the law implies, from the particular transaction. It is a mere equitable right, founded upon general justice, and governed by equitable principles. It depends upon the circumstances of each particular case, for there is no inflexible rule which a party has the right to invoke without regard to the



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equities of others. *Blair vs. Ward*, 10 *N. J. Eq.*, 119; *Patty vs. Pease*, 8 *Paige*, 277; *Guion vs. Knapp*, 6 *Paige*, 35; *Cowden's Estate*, 1 *Penn.*, 267.

A prior lien from its very nature binds every part of the land subject to it, and each part thereof equally. When the parties are in *equali jure*, they must contribute proportionately to discharge it, for equality is equity. *Harbert's Case*, 3 *Co.*, 11 *b*; *Hoy vs. Bramhall*, 19 *N. J. Eq.*, 563; *Dickey vs. Thompson*, 8 *B. Mon.*, 312; *Allen vs. Clarh*, 17 *Pick.*, 74; *Ruddick vs. Bates*, 2 *Iowa*, 423; *Parkman vs. Welch*, 19 *Pick.*, 231.

From this it follows that he who seeks to escape from his share of the common burden, must show the ground of his equity.

There are four well recognized instances where the first purchaser is not entitled to have the property sold in the inverse order of alienation:

Where the first purchaser as a part of the contract agrees to pay off the prior lien. *Welch vs. Beers*, 8 *Allen*, 151; *Mason vs. Payne*, *Walk. Ch.*, 459; *Day vs. Patterson*, 18 *Ind.*, 114; *Black vs. Morse*, 7 *N. J. Eq.*, 509; *Caruthers vs. Hall*, 10 *Mich.*, 40; *Mevey's Appeal*, 4 *Penn.*, 80; *Pool vs. Marshall*, 48 *Ill.*, 440.

Where the first purchaser as a part of the contract of purchase agrees to pay a certain amount of the prior liens. *Engle vs. Haines*, 5 *N. J. Eq.*, 186, *S. C.*, 632; *N. Y. Life Ins. & T. Co. vs. Milnor*, 1 *Barb. Ch.*, 353; *Torrey vs. Bank*, 9 *Paige*, 649; *Cissna vs. Haines*, 18 *Ind.*, 496; *McCullum vs. Turpie*, 32 *Ind.*, 146; *Warren vs. Boynton*, 2 *Barb.*, 13.

Where the first purchaser does not pay full value, but buys merely subject to the liens without specifying the amount he is to pay. *Hoy vs. Bramhall*, 19 *N. J. Eq.*, 74, 563; *Stillman vs. Stillman*, 21 *N. J. Eq.*, 126; *Briscoe vs. Power*, 47 *Ill.*, 447.

Where the first purchaser has not paid the full amount of the purchase money, but a balance remains unpaid.

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*Crafts vs. Aspinwall*, 2 N. Y., 289; *Allen vs. Clark*, 17 Pick., 47; *Selle vs. Andrews*, 19 N. J. Eq., 409.

The first mortgage was given by John Faulstich; the second by John Gebhard. There is no common debtor. But inasmuch as the equity arises from the obligation raised by the law from the transaction, cases of this kind constitute an exception to the rule that the assets cannot be marshalled unless there is a common debtor. *Guion vs. Knapp*, 6 Paige, 35; *N. Y. Life Ins. Co. vs. Milnor*, 1 Barb. Ch., 353; *Wickoff vs. Davis*, 4 N. J. Eq., 224; *Shannon vs. Marselis*, 1 N. J. Eq., 413; *Moore vs. Chandler*, 59 Ill., 466.

There is a distinction between an absolute conveyance and a mortgage. In the case of a purchaser, the obligation arises from the payment of full value and is therefore an obligation to protect the lot. But in the case of a mortgage, the obligation arises from the receipt of the loan and is merely an obligation to protect the loan. It arises out of the promise to repay the loan. A mortgagee therefore can never invoke the doctrine of a sale in the inverse order of alienation. The lot must be sold, his money deducted from the proceeds, and the balance applied to pay the prior liens, before a lot subsequently aliened can be sold. *Kellogg vs. Rand*, 11 Paige, 59; *La Farge Fire Ins. Co. vs. Bell*, 22 Barb., 54; *Pike vs. Goodman*, 12 Allen, 472.

The holder of the second mortgage has the right to file a bill to foreclose his mortgage, making the mortgagor and the holder of the prior liens parties. In such case his equity would be protected, and the purchaser would get a clear title. *Henshaw vs. Wells*, 9 Humph., 568; *Wylie vs. McMakin*, 2 Md. Ch., 413.

But in this case the second mortgagee sold merely under his own mortgage. The question thus arises whether his equity passes to the purchaser. It is manifest from the nature of the equity that it does not. The

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equity is a mere incident to the promise to repay the money, is inseparable from that promise, and does not pass to the purchaser. The purchaser merely buys the interest of the mortgagor in the lot; he does not buy the mortgage debt nor any incident thereof. In this branch of the law it is settled that the rights of parties may be changed by a change of circumstances; thus, if a junior incumbrancer waits until the lot, subject to his incumbrance, has been sold under a prior lien, he has no claim for contribution against any one. *Bains vs. Williams*, 18 *Miss.*, 113; *McGinnis' Appeal*, 16 *Penn.*, 445.

If a party at a judicial sale buys a lot that is subject to a prior mortgage, the legal presumption is that he only bids the value of the equity of redemption. *McKinstry vs. Curtis*, 10 *Paige*, 503; *Hardy vs. Smith*, 41 *Md.*, 1.

He therefore stands in the position of a purchaser who buys subject to the incumbrance without specifying the amount and must therefore contribute proportionately to discharge the prior lien. *Carpenter vs. Koons*, 20 *Penn.*, 222; *Mev-y's Appeal*, 4 *Penn.*, 80; *Dodds vs. Snyder*, 44 *Ill.*, 53; *Weaver vs. Toogood*, 1 *Barb.*, 238.

When property is bought subject to a mortgage, it becomes the primary fund for the payment of the debt, and the purchaser *quoad* the property becomes the principal debtor, and the mortgagor becomes a mere surety. *Johnson vs. Zink*, 51 *N. Y.*, 333; *Harris vs. Jex*, 66 *Barb.*, 232.

A purchaser is not entitled to an assignment of the mortgage; his remedy is to pay the debt and then file a bill for contribution. 1 *Jones on Mortgages*, sec. 792; *Matteson vs. Thomas*, 41 *Ill.*, 110; *Ellsworth vs. Lockwood*, 42 *N. Y.*, 89; *Lamb vs. Montague*, 112 *Mass.*, 352; *House vs. Thompson*, 3 *Head*, 512.

*M. S. Weil* and *J. J. Alexander*, for the appellee.

The doctrine of marshalling of securities is well settled. See *Leib vs. Stribling*, *Adm'x*, 51 *Md.*, 285; *Aldrich vs.*

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*Cooper*, 8 *Ves.*, 395; *Watkins vs. Worthington*, 2 *Bland*, 532; *Johns vs. Reardon*, 11 *Md.*, 470; *Watson vs. Bane*, 7 *Md.*, 128; *Durham vs. Rhodes*, 23 *Md.*, 243; *Schnebly vs. Ragan*, 7 *G. & J.*, 126; *Hamilton vs. Schwehr*, 34 *Md.*, 118; 1 *Story Eq. Jur.*, secs. 633 to 645.

The bill is not multifarious. The case of *Dolfield vs. Faulstich* is an *ex parte* proceeding, and Greif could by no device have made Burger a party thereto; and as the *gravamen* of his complaint was fraud and conspiracy between Dolfield and Burger and Cook, they were all necessary parties thereto. *Wilson vs. Wilson*, 23 *Md.*, 162; *Kunkel vs. Markell*, 26 *Md.*, 390; *Ashton vs. Ashton*, 35 *Md.*, 496; *Trego vs. Skinner*, 42 *Md.*, 426.

GRASON, J., delivered the opinion of the Court.

On the 15th of December, in the year 1874, Cornelia L. Henderson and others conveyed to John Faulstich two leasehold lots in Baltimore City, which are particularly described in their deed, and on the same day Faulstich executed a mortgage of the same lots to Cornelia L. Henderson to secure the payment of two thousand dollars. On the 28th of December, 1874, Faulstich sub-leased a part of these lots, which is described in the lease to Burger, it being part of the second lot conveyed by the Hendersons to Faulstich. On the 14th of September, 1876, Faulstich assigned all his interest in these lots to Gebhard, subject to the mortgage to Cornelia L. Henderson, as also to a mortgage which he had executed to the Broadway National Building Association, each dated the 15th December, 1874. On the 24th April, 1878, Gebhard mortgaged one of the lots designated as lot No. 1, to Max and Levi Greif, to secure the payment of fifteen hundred dollars. On the 5th November, 1878, Gebhard assigned all his interest in the lots to Bernard Funke, subject to the mortgage to Cornelia L. Henderson. A decree was afterwards obtained for the sale of the lot mortgaged by Gebhard to Max and

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Levi Greif; the lot was sold to Max Greif for \$1150, and a deed for that lot was afterwards, on the 29th January, 1879, executed to him by M. Starr Weil, the trustee, to make the sale.

On the 10th February, 1879, Cornelia L. Henderson, assigned her mortgage on both lots and the mortgage note to Alexander G. Dolfield, and on the following day, 11th February, 1879, Bernard Funke conveyed one of the lots, assigned to him by Gebhard, to Frederick Burger.

On the 7th March, 1879, Dolfield obtained a decree for the sale of all the mortgaged property described in the mortgage to Henderson, and Frederick C. Cook was appointed trustee to make the sale. On the 15th day of March, Max Greif, the appellee in this case, filed his bill against Dolfield, Burger and Cook, the trustee, in which, after setting forth the various conveyances of, and liens on the lots as hereinbefore stated, alleged that he had offered to pay the whole debt, secured by the Henderson mortgage, provided Cook, the trustee, would assign said mortgage to him, but that said offer had been refused by Cook, the trustee, and Dolfield. It further charged that Dolfield and Burger had combined and confederated for the purpose of relieving Burger's portion of said lots from the effect of the mortgage and threatened to first sell the lot of Max Greif, which, he alleged, was of greater value than the amount of the whole mortgage debt, interests and costs. It further charged that the complainant was entitled to pay off the whole mortgage debt, interest and costs, and have the mortgage and decree assigned to him so as to protect himself and his property from sale, and so that he could have the other lots sold "in the order in which, according to the rules of equity, said property should be sold for the satisfaction of said mortgage claim, interests and costs," and it is claimed that lot No. 2, described in the bill as No. 4, shall be first sold, and secondly, the reversion of the sub-lease in that portion of lot

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No. 2, which is described as lot No. 3 in the bill, subject to the interest of the sub-lease thereon, and that, if there should not be realized from such sales, an amount sufficient to pay the mortgage debt, interest and costs, then the complainant should hold his property discharged from the effect and operation of the mortgage. An injunction was also prayed, restraining a sale of the property of the complainant under Dolfield's decree, until a sale of the other parts of said lots should have first been made. The Circuit Court passed an order on the first day of April, 1879, consolidating the two cases, and ordering that on payment into Court of the mortgage debt, interest and costs, the trustee, Cook, be enjoined from making sale of the property as directed by the decree of March 7, 1879. Answers were filed, evidence was taken, and upon final hearing the Circuit Court, on the 8th January, 1880, passed a decree directing lot No. 4, mentioned in the bill, to be first sold by Cook, trustee, and if the proceeds of that sale should prove insufficient to satisfy the mortgage debt, interest and costs, that the reversion of the sub-lease in the lot mentioned as lot No. 3, should be sold, and if the proceeds of these two sales should prove insufficient for the purpose, that then the complainant should have the right to pay the difference in discharge of his lot No. 1, from the mortgage debt. The decree further directed the sum of money paid into Court, being the amount of the mortgage debt, &c., be repaid to Max Greif, the complainant. From this decreethese appeals have been taken, and the question presented is, whether or not the lots in question should be sold in the order directed by that decree.

The rule is too well settled to need the citation of authorities in its support, that where one person has a lien upon two funds, or two pieces of property, and another holds a lien upon but one of those funds or pieces of property, that the first lienor will be compelled, in equity, to seek satisfaction of his claim from that fund or piece of

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property which is not covered by the lien of the second lienor, before resorting to the fund or property which is covered by the second lien. This rule has been adopted and enforced so as, if possible, to enable all the lienors to receive payment of their claims, it being deemed inequitable that the first lienor should exhaust the fund or property to which alone the second lienor could look for payment, while he had another fund or property from which his claim could be, in whole or in part, satisfied.

There is another rule, which, we think, after a careful examination of the authorities, may be considered as settled—and that is, that where a party gives a mortgage upon his property, and afterwards conveys his equity of redemption to different parties at different times, the property so conveyed is liable for the mortgage debt in the inverse order of its alienation; or, in other words, that the property last conveyed must be exhausted in payment of the mortgage debt before the mortgagee can resort to that which was conveyed before it in point of time. While the decisions in some few of the States hold that the mortgaged property is equally bound in the hands of all parties to whom it may have been conveyed. The great weight of authority is in support of the rule we have stated. The decree of the Court below is based upon the latter rule, and the question is, whether the facts in the case now before us bring it within that rule.

It will be borne in mind that, after the deed of assignment of both the lots by Faulstich to Gebhard, that the latter mortgaged lot No. 1 to Max and Levi Greif on the 24th April, 1878, subject to the Henderson mortgage in common with lot No. 2. This mortgage was to secure the payment of the sum of fifteen hundred dollars. Gebhard then assigned all his interest in both lots to Bernard Funke after proceedings had been commenced by Max and Levi Greif to foreclose their mortgage. The appellee, Max Greif, became the purchaser of lot No. 1 at the trus-

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tee's sale, which was made *subject to the operation of the mortgage to Cornelia L. Henderson*. The price he paid for it was eleven hundred and fifty dollars, when the proof shows that the lot was worth from three thousand to three thousand five hundred dollars. It is evident, therefore, that he was enabled to purchase at the price named solely because this lot, in common with the rest of the land, was subject to the lien of the Henderson mortgage, which fact was announced and made known to the persons who attended the sale. Where a party purchases at a judicial sale, subject to a prior mortgage, it is to be presumed that he bids no more than the value of the equity of redemption. The appellee, having purchased at the trustee's sale, subject to the operation of the Henderson mortgage, would be bound equally with the other purchasers to pay his portion of the mortgage debt in proportion to the value of his lot, had it not been for the fact that the deed of assignment, executed by Gebhard to Funke, in express terms, charged the payment of the Henderson mortgage on the two lots so assigned to Funke, the consideration for the assignment being the sum of sixty dollars and "the payment of the mortgage hereinafter referred to," it being the Henderson mortgage. One of the exceptions to the rule we have referred to is, that where the mortgagor sells part of the mortgaged land, and by the deed charges the payment of the mortgage debt on the land so conveyed, the land so charged must be exhausted in satisfaction of the debt before any other parts of the mortgaged lands can be resorted to for payment, whether they remain in the hands of the mortgagor, himself, or have been conveyed to other parties. *Welch vs. Beers*, 8 *Allen*, 152; *Caruthers vs. Hall*, 10 *Mich.*, 40. After the deed of assignment to Funke, the appellee purchased lot No. 1 at trustee's sale, subject to the Henderson mortgage, and took his title subject to the charge, in common with lot No. 2 in Funke's hands, to pay the



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Henderson mortgage—each lot being liable for its proportion of the debt in proportion to its value at the time of its sale. But there is still another exception to the rule that property sold by a mortgagor must be resorted to for payment of the mortgage debt in the inverse order of its alienation, and that is where full value has not been paid for the land, but it has been sold *subject to the mortgage*; and the purchaser's liability to pay his proportion of the debt forms part of the consideration of his purchase. This principle is sustained by the cases referred to on this point in the appellants' brief, to one of which only do we deem it necessary to refer, as announcing the only just and equitable rule in such cases. In *Carpenter vs. Koons*, 20 Pa. State Reps., 226, 227, BLACK, C. J., in delivering the opinion of the Supreme Court, says: "A man who purchases part of a tract covered by a mortgage, buying the title out and out, clear of incumbrances, and paying a full price for it, has a clear right to insist that his vendor shall allow the remainder of the mortgaged premises to be taken in satisfaction of the mortgage debt before the part sold is resorted to. This being the right of the vendee against the mortgagor himself, the latter cannot put the former in a worse condition by selling the remainder of the land to another person. The second purchaser sits in the seat of his grantor, and must pay the whole value of what he bought towards the extinguishment of the mortgage before he can call on the first purchaser to pay anything. The first sale having thrown the whole burden on the part reserved, it cannot be thrown back again by the second sale. In other words, the second purchaser takes the land he buys subject to all the liabilities under which the grantor held it. But if the rule is to cease when the reason of it ceases, it cannot extend to a case where the first sale was made *subject to a mortgage*, and that is the condition of the present one." Where all the purchasers from a mortgagor have bought

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subject to a mortgage, the obligation of each to pay the mortgage forming part of the consideration of his purchase, they all stand upon equal footing, and the mortgagee has the right to sell any part he may think proper for the payment of his debt, and the only remedy the party whose land is sold has, is a proceeding to compel contribution from the other purchasers.

There was error, therefore, in the decree of the Circuit Court in restraining the sale of lot No. 1 by Cook, the trustee, and in directing a sale as prescribed by said decree.

It is alleged in the bill, and has been contended in argument, that there was a combination and confederation by and between Cook, trustee, and the other defendants, to fraudulently release Burger's property from the operation of the mortgage, and to have the appellee's lot sold first therefor. We think the proof is not sufficient to sustain the charge; but even if it was, and it clearly appeared that Cook, trustee, and Dolfield, were endeavoring to sell the appellee's lot first, they were doing, as we have shown, what they had a right to do; nor can we see in what respect the appellee could have been injured thereby.

It was further contended that the appellee had the right to pay the debt, interest and costs, and thereupon to have the mortgage and decree assigned to him. We do not agree to this view. The appellee could have paid the amount due with the costs of the case, and such payment would have entitled him to have contribution from the other parties who had bought parts of the mortgaged premises.

For the reasons above assigned the decree appealed from will be reversed and the cause remanded for further proceedings, in accordance with the views expressed in this opinion.

*Decree reversed, and  
cause remanded. /*

(Decided 16th March, 1881.)

MICHAEL GAVIN, Administrator de bonis non of  
JOHN GAVIN, Deceased *vs.* MICHAEL CARLING.

*Settlement of a Decedent's Estate—Appropriation of Decedent's Property by the Widow, his Administratrix—Powers of the Orphans' Court—Re-opening and Re-stating an Account—Unadministered Assets—Administrator de bonis non—Art. 93, sec. 12, of the Code—Order of Orphans' Court to sell Leasehold Property appropriated by the Widow of Decedent, his Administratrix, and Mortgaged by her, and her Second Husband—Notice—Improvements made by Second Husband—Rights of Mortgagee—Equitable apportionment—Settlement in Orphans' Court, or in Equity, under a Proceeding for Injunction to stay Sale, issued at instance of Mortgagee.*

G. died, leaving a widow and minor children surviving him. His widow took out letters of administration on his estate, and afterwards re-married. She passed her account, whereby she appropriated to her own use, at the appraised value, the decedent's estate, consisting for the most part of leasehold property, in satisfaction of her advances to the estate to pay its debts and expenses, and of her distributive share. Her second husband, after improving the leasehold property, mortgaged it (she uniting therein,) to C., who, under decree of foreclosure, bought the property at the trustee's sale. The administratrix having died, and the account being, upon application of her children of the first marriage, re-opened by the Orphans' Court and re-stated, and it being held that the leasehold property, was unadministered, the eldest son of G. was appointed administrator *d. b. n.*, and ordered to sell the leasehold property, and was about to do so, when stayed by an injunction, issued on the bill of complaint of the mortgagee. In this proceeding it was HELD:

1st. That the widow and administratrix of G., had no right to appropriate the decedent's property to her own use; and that the Orphans' Court should not have authorized such act; that it was competent for that Court to re-open the account and have it re-stated, and show that the leasehold property remained unadministered.

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2nd. That letters of administration *d. b. n.*, were properly granted to the son of G., as the husband of the deceased administratrix, was not authorized under Art. 93. sec. 12. of the Code, to take charge of, and administer property left unadministered by her; and that it was the right and duty of the administrator *d. b. n.*, to sell the leasehold property and account for the proceeds.

3rd. That the parties were chargeable with knowledge of the defects in the proceedings in the Orphans' Court, and should be held to have dealt with respect to the property, in subordination to the rights of those interested in the legal settlement of the estate; that the mortgagee, however, was entitled by virtue of his mortgage, to whatever interest or right the mortgagors had in the premises at the date of the mortgage; but that in dealing with the net proceeds of sale, there should be an equitable apportionment made between the value of the property as it was left by the decedent, and the permanent beneficial improvements placed thereon since his death, rating their value and the enhancement of the property, as at the time of the sale, the improvements thus to be allowed to bear their proportion of all taxes, insurance and other charges and expenses, assessed or paid upon the basis of the improved condition of the property; and after all proper deductions, made upon fair and just principles of accounting, from the value of the improvements thus ascertained, and the one-third interest of the widow of G., to which those amounts were subject, the balance, whatever that might be, would be the extent of the mortgagee's interest in the premises; and that amount he should receive from the proceeds of sale; and that this settlement might be effected in the Orphans' Court, or the bill in equity retained to enforce the rights of the parties.

#### APPEAL from the Circuit Court of Baltimore City.

John Gavin died in 1861, leaving a widow and four children, Michael, Mary, Margaret and John. In 1864, the widow, Mary Gavin, was appointed by the Orphans' Court of Baltimore City, administratrix of the estate of her deceased husband, and on the 16th July, 1869, she passed an account, taking to herself the whole of the leasehold property and personal chattels of the deceased, at its appraised value. The children were then all under age. In 1864, Mary Gavin had intermarried with John

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McNulty, and on the 20th December, 1875, they executed a mortgage of the leasehold property of John Gavin, deceased, being a dwelling and lot of ground on Lexington Street, mentioned in the account passed by her in the Orphans' Court, to Michael Carling, to secure a debt due by John McNulty to Carling. This mortgage Carling foreclosed, and became the purchaser of the property mentioned, and received a deed for the same from the trustee appointed to make the sale. Mrs. McNulty, formerly Gavin, having died in November, 1876, the children of John Gavin, deceased, applied to the Orphans' Court to have the administration account re-opened, and to be permitted to surcharge and correct the same. The Orphans' Court, after hearing the facts in the case, passed an order dated June the 28th, 1877, referring the account of the administration of John Gavin's estate to the auditor to be re-stated in conformity with the judgment of the Court accompanying the order. The account was subsequently stated by the auditor and approved by the Court. Michael Gavin, the appellant, was then appointed administrator *d. b. n.* of the estate of John Gavin, deceased, and having been ordered by the Orphans' Court to sell the property on Lexington Street, was proceeding to sell the same, when stayed by an injunction issued on the bill of complaint of Michael Carling, by the Circuit Court of Baltimore City.

The answer of the defendant, Michael Gavin, administrator *d. b. n.* being filed and testimony taken, the Court, (GILMOR, J.) adjudged that Carling was entitled to hold the property free from all claim of Michael Gavin, administrator *d. b. n.*, and from all claim of persons claiming under John Gavin, deceased, and further decreed, that the injunction be made perpetual. From this decree Michael Gavin appealed. The case is further stated in the Court's opinion.

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The cause was argued before BARTOL, C. J., GRASON, MILLER, ALVEY, ROBINSON and IRVING, J.

*William A. Taaffe* and *James McColgan*, for the appellant.

The appellee was not entitled to relief. He had ample and adequate remedy in the Orphans' Court or at common law. Upon a proper showing, the order of the Orphans' Court could have been revoked, an issue could have been framed and sent to a Court of law, the sale could have been set aside on exceptions filed thereto, or he could have taken an appeal to this tribunal. Failing to take advantage of his legal remedies, in the absence of fraud or surprise, he cannot have recourse to equity. *Belt, Adm'r vs. Blackburn*, 28 Md., 234; *Gardner vs. Jenkins*, 14 Md., 61; *Windwart vs. Allen*, 13 Md., 197; *Chappell vs. Cox*, 18 Md., 513; *Suit vs. Creswell*, 45 Md., 531; *Lyday vs. Double*, 17 Md., 188; *Briesch vs. McCauley*, 7 Gill, 197; *Fowler vs. Lee*, 10 G. & J., 358; *Prather vs. Prather*, 11 G. & J., 110; *Dilly & Heckrotte vs. Barnard*, 8 G. & J., 171; *Gott & Wilson vs. Carr*, 6 G. & J., 309; *O'Bryan vs. Gibbons*, 2 Md. Ch., 9; *Marine Ins. Co. of Alexandria vs. Hodgson*, 7 Cranch, 332; *Barker vs. Elkins*, 1 Johns. Ch. Rep., 465; 2 Story Eq., 895 a.

Neither McNulty, nor the appellee claiming through him, is entitled to compensation for the improvements made by McNulty. The title to the property in the administratrix of John Gavin, was a matter of record, and McNulty, when he took the mortgage, had notice thereof. Compensation is only allowed in such cases where the party made the improvements *bona fide* and believing himself to have title. McNulty never pretended nor claimed that he had any title to this property. *Union Hall Association vs. Morrison*, 39 Md., 281.

Even if the appellee were entitled to compensation for the improvements, or for the support of the children of

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Mrs. Gavin by McNulty, the same should be determined at law by a jury trial.

*Richard J. Gittings*, for the appellee.

1. It was competent to the Orphans' Court to authorize John Gavin's widow to take the personal property in question, at the appraised value. The evidence shows that the appraisement was a just one, and that the estate suffered no prejudice by the absence of a public sale. A conversion of it into money was indispensable in order to effect a distribution; and in view of all the circumstances, including the fact that the estate was a very small one, and the evident good faith of the whole proceeding, the discretion of the Orphans' Court was well exercised in sanctioning the arrangement and avoiding needless expenses of advertising and sale. 1 *Code P. G. L.*, 679, *Art.* 93, *secs.* 272, 273, 274; *Ridman vs. Keller*, 2 *Gill*, 145; *Williams vs. Marshall*, 4 *G. & J.*, 379; *Allender vs. Riston*, 2 *G. & J.*, 99.

2. *A fortiori*, the transaction, which was in effect a judicial sale, cannot be disturbed after so long a lapse of time, and as against a subsequent purchaser, who, upon the faith of the Orphans' Court proceedings, has been led *bona fide* to pay a valuable consideration for the property.

3. The purchaser, Mr. Carling, has an equity entitling him to protection against a litigation which is so plainly vexatious and unjustifiable. Under any view of the legal effect of the Orphans' Court account, he is entitled to be subrogated to all the equities of Mr. and Mrs. McNulty. The widow was entitled to a clear third of all the estate. Upon the supposition that the leasehold in question was worth any more than she paid for it, she was entitled to one-third of any such difference. For the improvements erected by McNulty at his own expense, the property was equitably chargeable. The outlay so made amounted to more than \$2000, to which must be added interest for

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about fifteen years. McNulty and his wife—the natural guardian of her children by her former husband, were entitled to an allowance for their support, which, at the lowest possible estimate, must alone have absorbed any conceivable interest of theirs in the property. On this ground, therefore, independently of any other, the action of the Court of equity, in enjoining against a disturbance of the title of the appellee was amply justified.

4. The appellant, Gavin, has been guilty of unjustifiable *laches*. The transaction to which his mother was a party, and which he now seeks to disturb, took place in July, 1869, and, although he was at that time a minor, he attained majority the 16th of September, 1871, and he afterwards waited until October, 1877, a period of six years, during which the mortgage to Carling and subsequent sale were made.

The jurisdiction of equity to prevent the cloud which would be cast upon the title of the appellee by the contemplated sale is clear. *Polk vs. Reynolds*, 31 Md., 106; *McCann vs. Taylor*, 10 Md. 418.

ALVEY J., delivered the opinion of the Court.

That Mrs. McNulty, as administratrix of her former husband, John Gavin, deceased, had no right or power to appropriate the personal estate of the decedent to her own use, at the appraised value thereof, and thus make the property her own, to indemnify herself for money advanced to pay the debts and expenses of the estate, is entirely clear, upon what has been decided by this Court upon more than one occasion. *Hall vs. Griffith*, 2 H. & J., 483; *Haslett's Adm'r vs. Glenn*, 7 H. & J., 17. Nor had the Orphans' Court the power to authorize such appropriation. Hence the account settled in the Orphans' Court by the administratrix, on the 16th of July, 1869, was clearly erroneous, at least in so far as it allowed her to retain the leasehold property on Lexington street,



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Baltimore, in satisfaction of her advances to the estate of \$339.57, according to that account, and of her distributive share, as there allowed, of \$90, aggregating \$430. The appraised value of the leasehold property was \$400.

The account being thus erroneous upon its face, and subject to impeachment by those interested in the proper settlement of the estate, it was perfectly competent to the Orphans' Court, upon application, to re-open the account, and to direct a re-statement thereof, in order to correct the errors disclosed; as was done by the order of that Court of the 28th of June, 1877. *Scott vs. Fox*, 14 Md., 388; *In the Matter of Stratton's Estate*, 46 Md., 551. And as there is nothing appearing in the record to raise a doubt as to the correctness of the account as re-stated, and approved by the order of the 17th of August, 1878, we must take that account, as thus re-stated and approved, as being in all respects proper and correct. The account speaks and shows the condition of the estate as of the 16th of July, 1869. And instead of being a final account, closing the administration of the estate, according to the profession and showing of the original account as stated and passed, it now appears that the estate is still open, and that the leasehold property remains *unadministered*. Mrs. McNulty died in the latter part of the year 1876, and before any further or final account was settled; and consequently, an administration *de bonis non* became necessary; and such letters have been granted, and the unadministered property has devolved upon the administrator *de bonis non*, who is the defendant in this cause. Under sec. 12 of Art. 93 of the Code, the surviving husband of the deceased administratrix is required to state an account; but that account is only required to show "the amount of money and property received, and of payments and disbursements, made by such administratrix, or that may have been received or paid by him, (the husband) and not before accounted for with the Court." He is not authorized to

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take charge of and administer property left unadministered by the deceased administratrix.

There can be no question therefore but that the leasehold property in question, and which forms a part of the personal estate of John Gavin, deceased, has legally and rightfully devolved on the defendant as administrator *de bonis non*; and we think it equally free from doubt that he has a right, and that it is his duty, to proceed to sell such property, and account for the proceeds. There would, however, appear to be some considerable hardship in the case; the property having been improved at considerable cost, and the parties having acted on the settlement of the estate as made by the sanction of the Orphans' Court, allowing the leasehold property to be taken by the widow of the deceased at a valuation, by making an assignment of it by way of mortgage to a third party for valuable consideration. But the parties must, in strictness, be chargeable with knowledge of the defects in the proceedings in the Orphans' Court, and be held to have dealt with respect to the subject-matter in subordination to the rights of those interested in the legal and proper settlement of the estate.

We are of opinion, however, that there is an equity in respect to the proceeds of sale, to which the complainant is entitled. He, of course, is entitled, by virtue of his mortgage, to whatever interest or right McNulty and his wife, the mortgagors, had in the premises at the date of the mortgage. The proof shows that at the death of Gavin, the leasehold lot was but poorly improved. It had a small house upon it, consisting of two small rooms, one over the other, and a small shed back-building, of one room, used for a kitchen. As we have already stated, this lot with the improvements upon it, was only valued at \$400. And this was nearly all the property he left, and it was the only home of his family, consisting of his wife and four minor children—two boys and two girls. After the

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widow married McNulty, in 1864, there was not room in the house for the decent and comfortable accommodation of the family. The enlargement of the building became a necessity if the family continued to occupy the property as a home. Under the press of this necessity, McNulty, after his marriage, tore down the old and erected in its stead a new substantial house, adequate to the wants and requirements of the family, at a cost of over \$2000. This was the improvement on the lot at the time it was mortgaged to the complainant in December, 1875. The property, thus improved, was sold to the complainant, under a decree of foreclosure of his mortgage, for \$2300.

McNulty and his wife were not in wrongful possession of the property; they were not trespassers or intruders; nor were they without interest in the premises. The wife had her one-third interest in the property, and she was the natural guardian of her children, entitled to the other two-thirds; and they were then living with and being supported by their mother and her husband.

In 2 *Story Eq. Juris.*, sec. 1234, it is laid down as a settled doctrine of equity, that there is a lien resulting to a joint owner of any real estate, *or other joint property*, "from repairs and improvements made upon such property for the joint benefit, and for disbursements touching the same. This lien sometimes arises from a contract, express or implied, between the parties, and sometimes it is created by Courts of equity, upon mere principles of general justice, especially where any relief is sought by the party, who ought to pay his proportion of the money expended in such repairs and improvements; for, in such cases, the maxim well applies: *Nemo debet locupletari ex alterius incommodo.*" And so, in sec. 1237, of the same author, it is said, "where a tenant for life, under a will, has gone on to finish improvements permanently beneficial to an estate, which were begun by the testator, Courts of equity have deemed the expenditure a charge,

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for which the tenant is entitled to a lien." And in the case to which the author refers, of *Hibbert vs. Cooke*, 1 *Sim. & Stu.*, 552, the Vice-Chancellor directed an inquiry as to "whether it was for the benefit of all parties interested in the testator's estate that the mansion-house should have been finished; and if so, then to inquire what had been properly expended by the widow in that respect," with a view of making the expenditure a charge. The principle is a just and reasonable one, dependent upon no mere technicality, and it would seem to be entirely applicable to this case. That the improvements here made were both beneficial and necessary to all concerned, can admit of no doubt. Indeed the family could not have been accommodated without them; and the property as left by the decedent Gavin could not have been disposed of for enough to provide the widow and infant children with a more commodious home.

As determined by the Orphans' Court in the opinion delivered by them, and upon which the order of the 28th of June, 1877, was passed, the husband of the deceased administratrix of Gavin, in rendering the further account required of him by the statute, from the 16th of July, 1869 to the time of the death of his wife, would only be chargeable with the rents of the property *as it was left by the decedent*. Upon the same principle, and for the same reason, the accountability for the property itself should be as it was left by the decedent, and not for the additions and necessary improvements placed thereon by the money and labor of the widow or her second husband, under the circumstances disclosed in the case. In dealing with the net proceeds of sale, therefore, there should be an equitable apportionment made, between the value of the property as it was left by the decedent, and the permanent beneficial improvements placed thereon since his death, rating their value and the enhancement of the property as at the time of the sale. The improvements thus to be allowed for

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must, of course, bear their just proportion of all taxes, insurance, and other charges and expenses, assessed or paid upon the basis of the improved condition of the property; and after all proper deductions, made upon fair and just principles of accounting, from the value of the improvements thus ascertained, and the one-third interest to which Mrs. McNulty was entitled as the widow of the deceased John Gavin, (to which those amounts are subject,) the balance, whatever that may be, will be the extent of the interest of the mortgagee in the premises; and that amount he should receive from the proceeds of sale. In the sale made under the decree of foreclosure, of course, no other or greater interest was disposed of than was conveyed or assigned by the mortgage.

This settlement may all be effected in the Orphans' Court, or the present bill may be retained to enforce the rights of the parties as herein determined.

The decree appealed from will be reversed, the injunction dissolved, and the cause remanded.

*Decree reversed, and  
cause remanded.*

(Decided 16th March, 1881.)

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CLINTON McCULLOUGH, Trustee *vs.* GEORGE W.  
PIERCE.

*Practice in Equity—Allowance of Commissions to a Trustee  
in case of a Re-sale—Appearance Fee—Fee as Counsel—  
Rule of Court—Duty of Trustee to exact Compliance with  
the Terms of Sale.*

A trustee appointed by decree to sell mortgaged real estate, who sold the same, and received part of the purchase money from the pur-

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chaser, and who, on failure of the purchaser to pay any part of the balance, or to comply with the terms of sale as prescribed by the decree, obtained an order for the re-sale of the property, and re-sold it, should be allowed commissions only on the sum actually received by him on account of the first sale, and also commissions on the whole amount of the re-sale. He is entitled in such case to only one appearance fee.

Where a loss has resulted to the mortgagee by reason of the default of the first purchaser, he remains liable for the loss on the re-sale, (if any.) and the expenses attending the same, and if the trustee should collect the same, he would be entitled to commissions on the sums so collected.

A Circuit Court has no power to adopt a rule allowing, where a decree or order for sale is passed, a fee of \$30 to the complainant's solicitor, and an allowance under it by the auditor of that sum to a trustee who sold mortgaged real estate, "as counsel for complainant," should not have been made.

A trustee appointed by decree to sell real estate, should exact a prompt compliance with the terms of the sale, or should require security from the purchaser for his compliance therewith, before the sale is ratified.

APPEAL from the Circuit Court for Cecil County, in Equity.

The case is stated in the opinion of the Court.

The rules of the Circuit Court referred to in the opinion are as follows:

On sales under decrees or orders of this Court, the following allowances shall be made to trustees:

On the first	500 dollars,	7	per centum.		
" second	"	"	6½	"	"
" third	"	"	6	"	"
" fourth	"	"	5	"	"
" fifth	"	"	4½	"	"
" sixth	"	"	4	"	"

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—and four *per centum* upon all amounts above the \$3,000 above allowed, besides the allowance for expenses not personal. The above allowance to be increased in cases of postponed sales, at the request of defendants, or extraordinary difficulty or trouble from other circumstances. Where there is no sale, as for instance where the defendant pays under the decree, and the trustee has bonded, the allowance shall be one-half the commissions hereinbefore prescribed, but may, in particular cases, be increased or diminished by special order of the Court.

The auditor shall allow in each case where a decree or order for sale is passed, a fee of thirty dollars to the complainant's solicitor, and where the defendant appeared by solicitor, the usual solicitor's fee shall be allowed out of the proceeds of sale.

The cause was argued before BARTOL, C. J., GRASON, MILLER, ALVEY, ROBINSON and IRVING, J., for the appellee, and submitted for the appellant.

*James B. Groome*, for the appellant.

*Henry Stockbridge*, for the appellee.

BARTOL, C. J., delivered the opinion of the Court.

It appears from the record in this case that a bill was filed by William G. Carter, the holder of a junior mortgage, for the sale of certain mortgaged real estate of Evan Lewis. George W. Pierce, the appellee, was the holder of a prior mortgage of the same property and was made a party defendant in the cause. A decree was passed for a sale, the appellant, who was complainant's solicitor, was appointed trustee to make the sale, and the terms of sale prescribed by the decree were "one-third of the purchase money to be paid in cash on the day of sale, and the balance in two equal instalments in six and twelve months

from the day of sale, to be secured by the bonds or notes of the purchaser, with approved security, bearing interest from the day of sale.

On the 12th day of August 1875, the trustee reported that he had sold the property, on the 5th day of August 1875, for \$6278.25 to William G. Carter, the complainant, who "*offered ready to comply with the terms of sale, when required to do so by the trustee.*" This sale was finally ratified on the 13th day of December 1875.

On the 28th day of July 1877, the trustee filed a petition setting forth that the purchaser had paid, on the 18th day of September 1875, to the trustee \$1524.23, on account of the purchase money, and that he had failed to pay any part of the balance of the purchase money, or to comply with the terms of sale as prescribed by the decree, and prayed for an order of re-sale, &c.

On the 21st day of December 1877, an order of re-sale was passed, and on the 26th day of February 1878, the trustee reported that he had, on that day, re-sold the property to George W. Pierce, the appellee, for \$2000. This sale was finally ratified May 1st 1878, and the cause was referred to the auditor, who stated an account on the 12th day of June, 1878, allowing to the trustee,

Full commissions on \$6278.25 the amount of	
the first sale as reported.....	\$296.13
Commissions on \$2000, amount second sale.....	122.50
Solicitors' fee in the case.....	10.00
Fee as counsel for complainant.....	30.00
As solicitor in proceedings for re-sale.....	10.00
Making in all for fees and commissions.....	\$468.63

The auditor's account was ratified on the 17th day of June 1878, and on the 24th day of the same month, a petition was filed by the appellee excepting among other



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things to the allowance of commissions in the auditor's account as excessive, and also objecting to the allowance of fees to the solicitor in excess of those allowed by law. This petition was answered by the trustee September 28th 1878, and by an order of Court passed June 23rd 1879, the petition was dismissed; afterwards, on the same day, it was agreed between the solicitors that "the order of June 23rd 1879 should be rescinded and stricken out, and the case disposed of upon its merits as if the order had not been passed." And on the 1st day of August thereafter, in accordance with the agreement, the order of June 23rd 1879, was rescinded and the cause set down for hearing on a day therein named, and the parties proceeded to take testimony.

Upon the hearing the Circuit Court decided that the trustee should be allowed commissions only on the sum actually received by him on account of the first sale, and full commissions on the amount of the re-sale, and that the appearance fee awarded him by the auditor in the proceedings for the re-sale should be disallowed. On the 16th day of June 1880, the auditor stated an account in conformity to this decision; exceptions thereto were filed by the appellant; and the Circuit Court by its order passed on the 21st day of June 1880, *sustained* the exceptions filed by the appellee to the auditors' report filed on the 12th day of June 1878, and rejected the said report, and *overruled* the exceptions filed by the appellant, trustee, to the auditors' report and account of June 16th 1880, and ratified and confirmed the same.

From this order the present appeal was taken. By an agreement filed in the case it was admitted, that the proceeds of sale as originally made and reported by the trustee would have been sufficient, if the terms of sale had been complied with, to pay all expenses, all prior incumbrances, and the mortgage debt of the appellee in full; and that the sum received by the trustee on account of first sale

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together with the entire proceeds of the second sale is not sufficient to pay expenses and prior claims upon the trust estate, and the appellee's claim in full, but when all has been so applied to said claims according to their respective priorities, a balance still remains due to the appellee, viz., the sum of \$1445.23 with interest from 26th February 1878, the day of the re-sale.

By the last auditor's report, which was ratified, the sum of \$30 was allowed to the trustee "as counsel for complainant." That allowance appears to have been made under a standing rule of the Circuit Court produced in evidence. It is very clear that there is no legal authority or power in the Court for the adoption of a rule of that kind, and such allowance ought not to have been made; but as no exception to it was filed by the appellee, nor any appeal by him from the order ratifying the account, the same cannot be corrected in that particular in this Court.

The only questions open before us on the appeal taken by the trustee, are whether the trustee ought to have been allowed commissions upon the whole amount, or price at which the first sale was made and reported; and *secondly*, whether he was entitled to be allowed \$10 fee, in the proceedings for re-sale.

1st. By the 23rd Rule of the Circuit Court produced in evidence, commissions to trustees at the rate therein specified, are allowed "on sales under decrees or orders of the Court."

The construction put on this rule by the appellant is that under the rule, commissions are to be allowed upon the whole amount at which the trustee may report a sale to have been made, whether the sale has been complied with or not, and without regard to the amount which has actually come into the trustee's hand from such sale.

This is not a true construction of the rule, nor in accordance with sound principles governing the allowance of commissions. The basis for such allowance is the amount

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received and paid out by the trustee, and the rule is analogous to that governing the allowance of commissions to executors, administrators and guardians.

In a case like the present, where only a small portion of the purchase money under the first sale has been received by the trustee, and a re-sale has become necessary by reason of the default of the purchaser, which has resulted in a loss to the mortgagee, the rule laid down by the Circuit Court in its opinion seems to us to be strictly correct; that is, to allow the trustee commissions only on the sum actually received by him on account of the first sale, and also commissions on the whole amount of the re-sale.

The first purchaser remains liable for the loss on the re-sale, and the expenses attending the same, and if the trustee shall collect the same he will be entitled to commissions on the sum so collected.

Any other rule would operate unjustly, and would offer a temptation to trustees to make sales to irresponsible bidders, at extravagant prices without any reasonable expectation that the terms of sale will be complied with, if commissions were to be allowed upon the whole price at which every sale may be made and reported, without regard to the amount realized therefrom. In this case there is no imputation upon the conduct of the trustee in this respect, the first sale made by him, was made in good faith, to a party believed to be a *bona fide* purchaser; and the only fault or omission of duty that can be ascribed to the trustee is his failure to "exact a prompt compliance with the terms of the sale, or to require security from the purchaser for his compliance therewith, before the sale was ratified." *Mealy vs. Page, Ex'r*, 41 Md., 185.

Under the facts and circumstances of this case, as disclosed by the evidence, we think there was no error in disallowing the fee of \$10 in the proceedings for a re-sale. Those proceedings arose from the *laches*, and omission of the trustee.

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With respect to the objection made by the appellant, that the exceptions of the appellee to the auditor's report of June 12th 1878, were made too late, it is sufficient to say that they appear to have been made in twelve days after the order ratifying that report had been passed, and before the order had been enrolled. In addition to this any such objection was waived by the agreement to rescind the order of June 23rd 1879, and submitting the cause upon its merits, after taking testimony in the case.

*Order affirmed, and  
cause remanded.*

(Decided 16th March, 1881.)

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JOSEPH T. BROWN, Trustee, and others vs. THE  
MARYLAND MINING AND MANUFACTURING COM-  
PANY, and others.

*Marshalling of Securities—Defective Mortgages to secure  
Coupon Bonds—Notice—Judgments—Coupons Attached to,  
and Detached from Bonds—Coupons lifted by a Bank, as  
Agent.*

The Md. F. M. and M. Co., on the 1st July, 1868, executed a mortgage of all its property to B., and others, to secure the payment of \$100,000 of coupon bonds, issued at the same time by the company. On the 1st January, 1870, the company executed to the same parties another mortgage of the same property, to secure the payment of other \$100,000 of coupon bonds, issued at the same time by the company. On the 30th October, 1872, the company executed to S. and T., a mortgage of the same property, to secure the payment of two promissory notes in favor of K. and C., amounting to \$30,000. On the 28th March, 1873, U. D. obtained judgment against the company for \$1179.07, and issued execution, which was levied on the company's property. D. assigned the judgment

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on the 26th August, 1873, to H., president of the company. On the 14th October, 1874, B. levied an attachment on the company's property, for \$8687.72. It being discovered in 1874, that the mortgages were defective, in consequence of their not having been acknowledged in accordance with the requirements of the Code, and not having the required affidavit of consideration, nor the corporate seal affixed, on the 12th October, 1874, a resolution of the company, authorized deeds to be executed, confirming what was contained in each of the mortgages, which deeds were accordingly duly executed on the 16th, 19th and 20th October, 1874, respectively, and acknowledged and recorded the first on the 20th, and the other two on the 22nd October, 1874. Default having been made in the payment of the coupons of the first series of bonds, B., trustee, at the request of the holders of some of the said bonds and overdue coupons, filed a bill in equity, on the 4th November, 1874, to obtain a sale of the property of the company, and to determine how the proceeds should be distributed. **Held:**

That the property should be sold for the payment of the claims against it, in the following order:—

- 1st. The costs of the proceedings and the trustee's commissions.
- 2nd. H. assignee of U. D's judgment less \$185.79, part of said judgment; as it appeared, that in 1872 the company executed two notes to W. H. D. one for \$600 and the other for \$347.72 afterwards endorsed to U. D.; that W. H. D. had no notice of the mortgages; that in 1872 U. D. had dealings with the company by which it became indebted to him \$185.79, balance due him on a settlement of accounts on the 1st August 1872, on which causes of action he obtained the judgment for \$1179.07; and as the \$185.79 was a debt incurred by the company after U. D. had heard from common report that the company had issued bonds and executed mortgages to secure them, which report was sufficient to put him on enquiry, and notice should be imputed to him.
- 3rd. B's judgment of condemnation, as the debt was contracted before the deeds of 1874 were recorded, and without notice of the defective mortgages.
- 4th. O. having filed in the proceedings second mortgage bonds to the amount of \$5000 with the coupons, and there being no evidence, that he had notice of the first series of bonds or of the defective mortgage to secure them, nor anything appearing on the face of the second series of bonds or their coupons to indicate that a first series had been issued and a mortgage executed to secure their

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payment, and if it should further appear, that O. purchased the bonds filed by him before the recording of the confirmatory deed, his \$5000 worth of bonds and coupons would be entitled to payment next in order; but if it should appear that they were obtained by him after the confirmatory deed was duly recorded, then their payment should be deferred until the holders of the first series of bonds and their coupons shall have been paid.

5th. The bonds secured by the first mortgage and their coupons, whether attached to, or severed from the bonds and transferred and held *bona fide*, should be paid *pari passu*.

6th. The bonds secured by the second mortgage with their coupons, whether attached or detached and transferred, the holders having taken them with knowledge of the prior mortgage, should be paid *pari passu*.

7th. The notes secured by the third mortgage C. and K., having had knowledge of the bonds and of the two prior mortgages.

8th. All other claims against the company payable ratably, including the claim of coupons filed in the proceedings by the receiver of a bank, it appearing that the bank did not purchase the coupons but redeemed them as agent for the company and on its account, the bank being the place where the coupons were payable.

APPEAL from the Circuit Court for Montgomery County, in Equity.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., GRASON, MILLER, ROBINSON and IRVING, J.

*James B. Henderson* and *William Pinkney Whyte*, for the appellants.

*Thomas Henderson* and *William H. Tuck*, for the appellees, *Charles W. Hayden*, *Joseph A. Blunden*, *Hillary L. Offutt*, *Henry D. Cooke, Jr.*, *Wm. H. Barnard*, receiver of the First National Bank of Washington, D. C., and *Henry D. Cooke, Jr.*, assignee of said Bank.

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GRASON, J., delivered the opinion of the Court.

This appeal is taken from two decrees of the Circuit Court for Montgomery County, sitting in equity, and the questions presented are as to the priorities of the respective claimants in the distribution of the proceeds of the sales of the property decreed to be sold.

It appears from the record that on the first day of July in the year 1868, the Maryland Freestone Mining and Manufacturing Company of Montgomery County, Maryland, a corporation under the general incorporation laws of this State, made and executed coupon bonds, each for the sum of five hundred dollars, to the amount of one hundred thousand dollars, payable at the First National Bank of Washington City in the District of Columbia, on the first day of January, in the year 1881, with interest at six per cent., payable at the same bank in gold coin semi-annually on the first days of January and July in each year, and at the same time executed a mortgage of all the property of the Company to secure the payment of the bonds and coupons so issued, at the times and in the order they might respectively become due and payable. On the first day of January in the year 1870, the said corporation made and executed a second series of coupon bonds of the same denomination as those of the first series and to the amount of one hundred thousand dollars, payable on the first day of January, 1885, at the same bank, with the same interest payable on the same dates and in all other respects like those of the first series, and to secure the payment of them a second mortgage of the same property as that covered by the first deed, was executed by the corporation.

On the 30th day of October in the year 1872, the corporation executed a mortgage of the same property to Henry C. Swain and William M. Tenney, as trustees, to secure the payment of two promissory notes of even date with the mortgage, one in favor of John L. Kidwell for

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the sum of \$24,250, and the other in favor of Henry D. Cooke for the sum of \$5750; each payable at said First National Bank of Washington City, on the first day of November, in the year 1877, and bearing interest at the rate of six per cent., and payable semi-annually.

On the 28th of March, in the year 1873, Upton Darby obtained, in the Circuit Court for Montgomery County, a judgment against the corporation for the sum of \$1179.07, with interest and costs, and issued execution thereon, which was levied on the lands and personal estate of the corporation; and afterwards on the 26th day of August, 1873, assigned the same to Charles W. Hayden, who was then the president and general manager of the corporation.

On the 14th day of October, 1874, Joseph A. Blunden sued out and levied an attachment on the property of the corporation for the sum of \$3687.72, with interest and costs.

Some time in the autumn of 1874 it was discovered that all three of these mortgages were defective in consequence of their not having been acknowledged in accordance with the requirements of the Code and not having the affidavit as required by the 29th section of Article 25, and not having the corporate seal affixed. On the 12th day of October, 1874, the corporation adopted a resolution authorizing and directing confirmatory deeds to be executed, confirming all that was contained in each of the original deeds, as of and from their dates, and that they should be recorded according to their original priorities. Deeds were accordingly executed and acknowledged on the 16th, 19th and 20th October, respectively, and recorded, the first on the 20th and the other two on the 22nd of October. These last three deeds were executed and acknowledged in conformity with the provisions of the Code.

Default having been made in the payment of the coupons of the first series of bonds, Joseph T. Brown, the



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trustee, named in the two first named deeds, at the instance and request of the holders of some of the said bonds and overdue coupons, filed the bill in this case on the 4th day of November, 1874, praying a sale of the property for the payment of the overdue interest. All persons interested were made parties, or came in by petition, and by agreement of the parties the auditor was appointed a special commissioner to take testimony and state accounts, showing the number and amounts of the bonds secured by the respective mortgages, and classifying them according to their respective legal priorities; and also showing the number and amounts of the various coupons for interest attached to any and all of said bonds which were due and unpaid, preliminary to the passage of a decree. Testimony was taken by the auditor, under the aforesaid order of Court, as also under a commission afterwards issued to Washington City, and a large number of bonds and coupons were filed. First mortgage bonds to the amount of \$90,000 and overdue coupons belonging thereto, amounting to \$23,188.25, including interest thereon from the time of their maturity to the date of the audit, were filed. In the latter sum was included \$2120.70 of coupons, which were filed by Edwin L. Stanton, receiver of the First National Bank of Washington and which had been detached from the first mortgage bonds held by other parties. Charles W. Hayden, the secretary and treasurer of the company also filed over \$2000 worth of detached coupons of the first mortgage bonds. The commissioners of the Freedman's Saving and Trust Company filed second mortgage bonds to the amount of \$95,000, and overdue coupons belonging thereto, with interest to the date of the audit, amounting to more than \$30,000. Stanton, receiver of the First National Bank, also filed coupons of the second mortgage bonds aggregating \$536.55, and Hillary L. Offutt filed second mortgage bonds to the amount of \$5000, with all the coupons belonging to them.

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The auditor having failed to decide the questions of priorities of these claimants, the case was submitted to the Court upon the pleadings and evidence, and on the 5th day of April, 1878, a decree was passed providing for a sale of the property for the payment of the claims in the following order, to wit:

1st. The costs of the proceedings in the cause, including trustees' commissions.

2nd. Darby's judgment, interest and costs.

3rd. Blunden's judgment, interest and costs.

4th. Offutt's \$5000 second mortgage bonds, with the coupons belonging to them and overdue at time of sale of the property.

5th. Overdue detached coupons of *all* bonds held and filed by parties other than the holders of the bonds.

6th. First series of bonds with the coupons overdue at time of the sale.

7th. Second series of bonds, (other than Offutt's \$5000,) including coupons overdue at time of sale.

8th. Kidwell's and Cooke's notes with interest.

9th. All other claims filed and proved.

Afterwards, on the 21st day of November, 1878, the Circuit Court, upon petition filed to modify its decree, changed the fifth, sixth and seventh clauses of the decree so as to authorize payment to the coupon and bond holders, specified in said clauses respectively, who should be *bona fide* holders for *valuable consideration*. No question has been made in either the briefs or in the arguments of counsel as to the correctness of the decree in so far as it directs a sale of the property covered by the mortgages.

The only questions raised relate to the order in which the respective claims filed are entitled to be paid, and there is no question that the costs of the proceedings in this cause, and the trustees' commissions are to be first paid out of the proceeds of sale.

The judgment of Darby was assigned to Hayden on the 26th day of August, 1873. It appears that in 1872 the

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corporation executed two notes to William H. Dougal, one for six hundred dollars and the other for three hundred and forty-seven dollars and seventy-two cents, and that they were afterwards endorsed to Darby. It does not appear that Dougal had any notice whatever of the mortgages, which had been executed by the corporation in 1868 and 1870. In 1872, Darby had dealings with the corporation by which it became indebted to him in the sum of \$185.79, that sum being the balance due him on a settlement of their accounts on the first day of August, 1872. He obtained a judgment on these causes of action for \$1179.07 with interest and costs in March, 1873, and entered them to the use of C. W. Hayden, who was secretary, treasurer or president of the corporation from 1867 to 1875.

Darby is clearly entitled to priority over all other creditors of the corporation in the payment of his judgment less the sum of \$185.79. This last amount was a debt which the corporation incurred after Darby, according to his own evidence, had heard, from common report, that the corporation had issued bonds and executed mortgages to secure them. Such common report was sufficient to put him upon inquiry, and had he made inquiry he would certainly have found that such bonds had been issued and mortgages executed and recorded; and though the latter were defective, actual notice of their existence would have been sufficient. Hayden, the assignee of the judgment, is therefore, entitled to a preference in the payment of said judgment less the sum of \$185.79, part of said judgment.

The debt to Blunden was contracted before the mortgages of 1874 were recorded, and without notice of the previous defective mortgages, and his judgment is entitled to be paid next after the judgment of Hayden as above provided.

There is no evidence in the record that Offutt had any notice of the first series of bonds, or any actual notice of

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the mortgage to secure them, nor is there anything appearing on the face of the second series of bonds, or their coupons, to indicate that a first series had been issued by the company, and a mortgage executed to secure their payment. If Offutt purchased these bonds before the recording of the confirmatory mortgage; that is before the 16th day of October, 1874, his five thousand dollars' worth of the second series of bonds and their coupons, are entitled to payment next in order after the payment of the judgment of Blunden. But if they were obtained by him after said mortgage was duly recorded, then their payment must be deferred until the holders of the first series of bonds and their coupons have been paid. There is no proof in the record to show at what time he purchased them, but it may be supplied in the Court below when this cause is remanded.

When this case was before us at the April Term, we were of opinion that the *detached* coupons of both the first and second series of bonds, in the hands of *bona fide* holders for valuable consideration, were entitled to payment *pari passu*, next after the payment of the five bonds of the second series, in the hands of Offutt, and their coupons. Upon the re-argument we have been referred by the counsel of the respective parties to several authorities upon this point, and they have been carefully considered. Some of the cases referred to by the appellants, hold that an assignee of one or more of several notes, secured by mortgage, is entitled to a priority in payment out of the proceeds of a sale of the mortgaged premises over the assignor, the holder of the other mortgage notes, and it is therefore contended that, the assignees of the detached coupons, should also be preferred to the holders of the coupons attached to the same bonds in the hands of the holders of the bonds. Whatever the law may be in other States, it has been settled in this State that the assignee of a mortgage note is not entitled to

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priority over the assignor, who holds other notes secured by the same mortgage. *Dixon vs. Clayville, Adm'r*, 44 Md., 580. In *Stevens vs. The New York and Oswego Midland Railroad Company*, 13 Blatchford Cir. Court R., 417, it was held that the interest on the bonds should be paid before the bonds themselves. But Judge BLATCHFORD based this ruling upon the terms of the mortgage which provided that in case of default and sale of the mortgaged premises, the principal and interest should be paid "according to the tenor and effect of the mortgage." In the mortgage in the case now before us there is no power of sale. The company became insolvent, and thereupon the whole principal and interest became due and payable out of the proceeds of sale, and the holders of the first mortgage bonds and their coupons, became entitled to payment next in order after the claims hereinbefore mentioned, as entitled to a preference over them, whether such coupons were still attached to the bonds, or whether they had been severed from them and transferred to other parties. We can see no reason for giving a preference to coupons which have been detached from the bonds and transferred to other parties, over those which still remain attached to the bonds, and we fully concur in the views expressed by Mr. Justice STRONG, in delivering the opinion of the Supreme Court in the case of *Kitchum vs. Duncan*, 6 Otto, 670. In that case detached coupons had been purchased by Duncan, Sherman & Co., and by them transferred to Duncan, who was a member of that firm, as well as a director of the railroad company. It was contended that, inasmuch as Duncan, Sherman & Co. were the financial agents of the railroad company, the coupons held by them should be considered as paid by the railroad company; but the Court, after deciding that the coupons could not be considered as paid by the railroad company, because the firm had paid its own money for them, said: "But we think that they (the coupons) have no equity superior to

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that of the bonds from which they were taken, or the subsequently maturing coupons. The mortgage was given as a security for the principal of the bonds as well as the interest, with no priority to either. The coupons are mere representatives of the claim for interest. The obligation of the debtor evidenced by them cannot be higher nor entitled to greater privileges than it would be had the bonds in their body undertaken the payment of interest. Cutting them from the several bonds of which they were a part, and transferring them to other holders, can give them no increased equities, so far as we can perceive.

\* \* \* \* \* A transfer or assignment of a claim, secured by a mortgage given to protect that claim, in common with other claims contemporaneously originating, would seem to refer the transferee to the common security, and measure his rights and equities by that. It is in vain to urge that as between the person transferring and the transferee there is an equity, or even a moral obligation, if it was the intention of the parties to participate *pari passu* in the proceeds of the property pledged as a security. And such an intention may well be inferred from an assignment or transfer without guaranty. The meaning of such a transfer without more is, that the transferee takes precisely the rights of the person from whom he takes his title, and no more. But certainly such a transfer cannot have the effect of giving to the transferee greater rights than those created by the mortgage." It was accordingly held in that case that coupons detached and transferred had no preference over the bondholders and other coupon holders. We think the rule thus laid down by the Supreme Court is the correct one to be applied to this case, and it therefore follows that the bonds secured by the first mortgage and their coupons whether attached to or severed from the bonds, and transferred and held *bona fide* must be paid *pari passu* next in order after the payment of Offutt's five bonds of the second series and their coupons.

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It is clear from the evidence, that the Freedmen's Savings and Trust Company took their ninety-five thousand dollars worth of the bonds secured by the second mortgage, and the coupons held by it, with full and actual notice of the prior mortgage, and its claim is not entitled to payment until the bonds secured by the first mortgage, and their coupons have been paid in full. The rule we have announced with respect to the coupons of the first mortgage bonds applies as well to those of the second series of bonds, and, therefore, whether detached and transferred or not, they and the bonds must be paid *pari passu*. The notes, secured by the third mortgage, are not entitled to payment until the bonds and coupons, secured by the first and second mortgages, have all been paid. Cooke and Kidwell, to whom the notes, secured by the third mortgage, were given, were officers of the Maryland Free Stone Company, and therefore notice of the bonds and the two prior mortgages must be imputed to them, and payment of their claims under the third mortgage must be postponed until those bonds and coupons have been paid. After the above-mentioned claims have been paid, then all other claims against the Mining Company are to be paid ratably, and, included in this class is the claim of the First National Bank of Washington City. The proof clearly shows that the coupons held by the Bank were not *purchased*, but redeemed by it, as the agent and on account of the Mining Company. The Bank was the place at which the coupons were payable, and Latham, its teller, proves that he never knew the Bank to buy such coupons as articles of trade or merchandise in the course of its business; but that he paid the coupons, by direction of its officers, and that, when the Mining Company did not have cash on deposit in the Bank, the coupons were paid by the Bank for and on account of the company. That this was done a number of times, and the coupons were then thrown into the cash

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and thus carried till the company lifted them. The claim of the Bank comes, therefore, clearly within the principle applied by this Court to the coupons of the preferred bonds of the Chesapeake and Ohio Canal Company, assigned by Selden, Brothers & Co. to the Commonwealth of Virginia, and must be governed by it. *Ches. & Ohio Canal Co. vs. The Commonwealth of Virginia and others*, 32 Md., 501.

*Decree reversed and  
cause remanded.*

(Decided 16th March, 1881.)

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STATE OF MARYLAND vs. PATRICK McNALLY AND  
THOMAS MYERS.

*Practice in Criminal Cases—Petition under Rule 1, as upon Writ of Error—The Discretion of a Court to Quash an Indictment—Review of its Judgment—Variation in Counts of an Indictment alleging Ownership of Property charged to be Stolen—When Indictment quashed, or the Prosecution required to Elect on which Count to Proceed—Art. 30, sec. 82, of the Code.*

The defendants were indicted in the Court below for stealing three bushels of wheat. The indictment contained three counts. The first count described the wheat as the property of the N. C. R. C. The second count described it as the property of the said N. C. R. C., in its capacity as common carrier and bailee of said wheat. The third count described it as the property of certain persons doing business under the name of M. & Co., the alleged consignees of the said wheat. The defendants moved to quash the indictment for defects, which they alleged, were apparent on its face, but which were not stated in the motion. The Court below quashed the indictment. Whereupon the attorney for the State, desiring to



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have the record removed into this Court, as upon writ of error, filed a petition in the name of the State, designating the questions of law, by the decision of which the State was aggrieved; namely, the quashing of the indictment. The petition stated that the point of the defendants was, that the ownership of the property, alleged in the indictment to have been stolen, could not be properly charged, in the same indictment, as being in different persons; inasmuch as this was, in effect, holding the defendants to answer upon several and distinct charges. The record being by order of the Court below, brought into this Court, it was **HELD**:

- 1st. That the State's petition met the requirements of the rule of this Court as to petitions in the nature of writs of error, and that the decision of the Court below was properly before this Court for review, as the action of the Court below in quashing the indictment did not depend upon its arbitrary discretion, but its discretion should have been governed by rules, and having acted in violation of them, its judgment could be reviewed and reversed.
- 2nd. That the indictment was sufficient in law, and the variation in the different counts, in alleging the ownership of the property charged to be stolen, formed no valid objection to it.
- 3rd. That if the objection to the indictment had been valid, it was not one for which a demurrer lay under Art. 30, sec. 82, of the Code, but it would have been competent for the Court in its discretion either to compel the prosecutor to elect upon which count he would proceed, or in a clear case to quash the indictment.

**APPEAL** from the Circuit Court for Baltimore County.

The case is stated in the opinion of the Court.

The cause was argued for the State before BARTOL, C. J., MILLER, ALVEY and ROBINSON, J.

*Charles J. M. Gwinn, Attorney-General*, for the appellant.

No counsel appeared for the appellees.

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BARTOL, C. J., delivered the opinion of the Court.

The defendants, McNally and Myers, were indicted in the Circuit Court for Baltimore County for stealing three bushels of wheat. The indictment contained three counts, the *first* described the wheat as the property of the "Northern Central Railway Company," a corporation of the State of Maryland; the *second* described the wheat as the property of the "Northern Central Railway Company," a corporation under the laws of the State of Maryland, then being in possession thereof in its capacity as common carrier and bailee of said wheat; and the *third* described the wheat as the property of certain persons therein named, doing business under the name of Meixsel & Co., the alleged consignees of the said wheat. The defendants, by their attorney, moved the Court to quash the indictment "for defects, which they alleged to be apparent on its face." The supposed defects were not pointed out or designated in the motion. The Circuit Court granted the motion and quashed the indictment.

Thereupon the attorney for the State desiring to have the record removed to this Court as upon writ of error, filed a petition in the name of the State, designating the questions of law, by the decision of which the State was aggrieved, namely, the quashing of the indictment. The petition states that the point urged by the defendants in support of their motion, was "that the ownership of the property, alleged in the indictment to have been stolen, could not be properly charged in the same indictment, as being in different persons or individuals, and that it was in effect, holding the defendants to answer upon several and distinct charges, and that it was so held and adjudged by the Court." Thereupon the Circuit Court ordered the record of proceedings in the case to be transmitted to this Court

In our opinion the petition by the State, "plainly designates the points or questions of law by the decision of

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which the State feels aggrieved," as required by Rule 1st, (29 *Md.*, 1,) and consequently that the decision of the Circuit Court is properly before us for review, as upon writ of error, unless it shall appear that the ruling by the Circuit Court is one from which a writ of error will not lie.

There has been no appearance in this Court for the defendants in error, nor any brief or argument on their behalf.

On the part of the State it has been contended that even if the objection to the indictment was valid, it was error to grant the motion to quash; because since the Act of 1852, *ch.* 63, *sec.* 2, (1 *Code*, *Art.* 30, *sec.* 82,) such objection can only be made by a demurrer. That section provides "that no indictment or presentment for felony or misdemeanor shall be quashed, nor shall any judgment upon any indictment for any felony or misdemeanor, &c. \* \* \* \* \* be stayed or reversed," for the omission or want of certain averments therein specified "or by reason of any mere defect or imperfection in matters of form which shall not tend to the prejudice of the defendant, *nor for any matter or cause which might have been a subject of demurrer to the indictment, inquisition or presentment.*" It is very clear that if the objection urged against the indictment in this case was one for which a demurrer would have lain previous to the Act of 1852, the objection could not be made since that Act by a motion to quash, nor in any other form except by demurrer. *Cowman vs. The State*, 12 *Md.*, 253; *Maguire vs. The State*, 47 *Md.*, 485.

But the ground of the motion, as it appears by the record, was that the indictment was alleged to contain several distinct charges of felony against the defendants; if this were so, it is well settled that it would not be a cause for demurrer, or ground for a motion in arrest after verdict. *Young, et al. vs. The King*, 3 *Term*, 106; *Burk*

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*vs. State*, 2 *H. & J.*, 429 ; 1 *Chitty Cr. L.*, 249m.; 1 *Archbold's Cr. Pr. & Pl.*, 295, (8th Ed.); *Wharton Cr. Pl. & Pr.*, sec. 285, (8th Ed.); 1 *Bishop Cr. Pro.*, ch. 29, sec. 449.

Where several distinct felonies are charged in the same indictment, the rule in England is as stated by Chitty (1 *Cr. L.* 449m.) "that the only mode of objecting to such a joinder of offences is by an application to the Court to quash the indictment before plea, or to compel the prosecutor to elect which charge he will try in the subsequent stage of the proceedings. But the Court will only listen to such a request, when they see that the charges are actually distinct and may confound the prisoner, or distract the attention of the jury."

This rule of the common law exists in Maryland, and in a case where there are several counts in the indictment, charging the defendant with more than one distinct and separate felonies, it is competent for the Court, in its discretion, either to compel the prosecutor to elect upon which he will proceed, or in a clear case to quash the indictment. Such a case does not fall within the provision of *Art. 30, sec. 82* of the Code; because it is well settled "that in point of law, it is no objection that two or more offences of the same nature, and upon which the same or a similar judgment may be given, are contained, in different counts of the same indictment. It therefore forms no ground for a motion in arrest, neither can it be objected by way of demurrer." *Kane vs. The People*, 8 *Wend.*, 211. We refer also to 3 *Term R.*, 106, and the other authorities before cited.

In this case, the error into which the learned Judge of the Circuit Court has fallen, is in construing the indictment as charging several distinct felonies, whereas it is obvious on the face of the indictment, "that the several counts relate to the same transaction, and that the variation of the form in which the offence is charged in the different counts is done with a view to meet the evidence." No

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valid objection can be made to the indictment on that account. *U. States vs. Dickinson*, 2 *McLean's C. C. R.*, 328; 2 *East's P. C.*, 515.

It is laid down by Chitty, (1 *C. L.*, 249,) "that the introduction of several counts which merely describe the same transaction in different ways, cannot be made the subject of objection; for the defendant can neither demur, apply to the Court to relieve him, nor move in arrest of judgment." The same doctrine is stated in 1 *Starkie on Cr. Pl.*, 43; 1 *Archbold's Cr. Pr. & Pl.*, 202, (8th Ed.)

In *Wharton's Cr. Pl. & Pr.*, sec. 297, it is said: "Every cautious pleader will insert as many counts as will be necessary to provide for every possible contingency in the evidence; and this the law permits. Thus he may vary the ownership of articles stolen, in larceny, of houses burned, in arson, or the fatal instrument and other incidents, in homicide."

The indictment in this case being sufficient in law, and the variation in the different counts, in alleging the ownership of the property charged to be stolen, forming no valid objection to the indictment, it was error in the Circuit Court to order it to be quashed.

The question remains, whether this ruling by the Circuit Court, is a subject for review upon writ of error? Ordinarily a motion to quash is addressed to the discretion of the Court, and it has repeatedly been decided, that the decision of the Court thereon, being a matter of discretion, is not subject to review by an appellate Court. The cases upon this subject are collected in *Wharton, Cr. Pl. & Pr.*, in the notes to sec. 387. The author says: "It has been frequently ruled, that as quashing is a discretionary act, error does not lie on its refusal. Even *granting* the motion has been held a matter of discretion, as to which there is no revision. But an examination of the cases will show that error has been sustained in numerous

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instances to such rulings, either directly, or indirectly. And it would be monstrous to assume that an inferior Court could defeat revision by putting its judgment in the shape of quashing. And the reason for review is peculiarly strong in those States in which defendants are required to avail themselves of certain formal defects, exclusively in motions to quash."

Many cases are cited by the author in which the erroneous action of the inferior Court, in quashing the indictment has been reviewed and reversed. Among them are, *State vs. Fortune*, 10 Miss., 466; *Rector's Case*, 11 Miss., 28; *Batchelor's Case*, 15 Miss., 207; *Wall's Case*, Id., 208; *Lupfoot's Case*, 19 Miss., 375; *State vs. Barnes*, 3 Ind., 570; *Commonwealth vs. Church*, 1 Barr., (Pa.) 105.

In the case last cited, GIBSON, C. J., who delivered the opinion of the Court, said: "This indictment is unexceptionable in form. We are of course bound to say the order to quash it is erroneous. This necessary consequence illustrates the rule stated by Mr. Chitty and other writers on criminal law, that though the Court has discretionary power over the subject, the exercise of it is to be governed by rules, and that the indictment is to be quashed only for some defect apparent in it, or in the caption of it, for instance, want of jurisdiction." In that case the indictment had been erroneously quashed for extrinsic facts, which were properly to be passed on by the jury.

In that respect the case is not like the present. But the decision is authority for the position, that the action of the Court in quashing an indictment, does not depend upon its arbitrary discretion; but that its discretion is to be governed by rules, and where it acts in violation of those rules, its judgment may be reviewed and reversed. Being of opinion that this is the correct doctrine; and it appearing that the ruling of the Circuit Court in this case was clearly erroneous, its order and judgment

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quashing the indictment will be reversed, and the cause will be remanded, to the end that the defendants may be required to plead to the indictment, and the trial be proceeded with according to law.

*Judgment reversed, and  
cause remanded.*

(Decided 16th March, 1881.)

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HENRY SEIM, LEWIS KRAUS and ANDREW J. GOLDEN-  
BURG vs. THE STATE OF MARYLAND.

*Selling Beer on Sunday—1866, ch. 66—Licenses, Art. 57 of  
the Code.*

The Act of 1866, ch. 66, known as the Sunday Liquor Law, does not apply to The Concordia, a club of Baltimore City.

Selling beer on Sunday is not Sabbath-breaking within the meaning of the Act of 1866, ch. 66.

The License Laws for sale of liquors in Art. 57, of the Code, do not apply to social clubs.

APPEAL from the Circuit Court of Baltimore.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., ALVEY, ROBINSON and IRVING, J.

*George C. Maund and Wm. Pinkney Whyte, for the  
appellants.*

*Charles J. M. Gwinn, Attorney-General, for the appellee.*

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BARTOL, C. J., delivered the opinion of the Court.

The appellants were indicted in the Criminal Court of Baltimore, under the provisions of *Art. 30, sec. 179 of the Code*, as amended and re-enacted by the Act of 1866, *ch. 66*. That Act provides that "no person in this State shall sell, dispose of, barter, or if a dealer in any one or more of the articles of merchandise in this section mentioned, shall give away, on the Sabbath Day, commonly called Sunday, any tobacco, cigars, &c., &c., *spirituous or fermented liquors, cordials, lager beer, wine, cider* or any other goods, wares or merchandise whatsoever;" and certain penalties are prescribed for the violation of the statute. The indictment contains three counts. The first charges the traversers with *selling beer* to Moses H. Springer on Sunday, the 19th day of October 1879.

The second charges them with "*disposing of*" beer to Moses H. Springer on the same day.

The third charges them as "licensed dealer" with "*giving away*" beer to Moses H. Springer on the same day.

The third count was abandoned, it being conceded that the traversers were not, nor was the association of which they were officers, a licensed dealer.

The case was submitted to the Court upon an agreed statements of facts, and the judgment being against the traversers, they have appealed.

It appears by the statement of facts, that the indictment found "against the traversers, was found against them, not as individuals, charging them personally with the violation of the 'Sunday liquor law' by selling or disposing of beer on their own account, but as officers of the corporation known as the 'Concordia,' that Henry Seim is president, Louis Kraus secretary, and Andrew J. Goldenburg treasurer of the said corporation, and each is a member of the board of directors. The incorporation of the 'Concordia' under the general incorporation law of the State is admitted, and also that the corporation has duly



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passed certain by-laws for its better government and regulation, and it was agreed that the charter, amended charter and by-laws and the Act of 1865, *ch.* 23, might be read in evidence. The purposes and object of the corporation were admitted to be correctly stated in section 9 of its amended charter, as follows: The 'Concordia' shall be dedicated to the intellectual, moral and social improvement of its members, the refinement of their tastes, and the development of good feeling among them. In furtherance of these objects it shall afford them opportunities for scientific cultivation, and rational amusements, and shall place before them, as far as may be, the best models of musical and dramatic art. It was further agreed that the association is conducted for the use of its members only, to provide for their rational entertainment and improvement; that it transacts no business of any kind whatsoever for the purpose of making any profit, directly or indirectly for itself or its members, and that the income derived from the various sources hereinafter enumerated is applied solely to defraying the expenses of the corporation; that the sources of its income are as follows:

"1st. Money loaned by active members to defray the expense of building club-house, said loans being represented by certificates of '*property stock*,' issued by the corporation.

"2nd. Entrance fee of \$10, for each new member.

"3rd. Annual fee of \$30, for each member.

"4th. Money paid by members for what refreshments and liquors they get and consume at the club-house.

"5th. Such additional assessments, fines and penalties as may be from time to time imposed upon the members.

"The money received from these various sources is expended in paying, 1st. the current expenses of the corporation, and if there is any balance, 2nd, the interest on the property shares as provided in by-law 24.

"With reference specifically to refreshments and liquors used and consumed in the club-house, it is agreed that

liquors are bought by the corporation, and kept in the club-house under the charge of the steward, an employé of the corporation; that the members of the club and no other persons whosoever, can get what liquors they want on any day, Sunday included, from the corporation through its steward, by calling for them, and paying a price fixed by the regulations of the corporation, and that this price is fixed and paid, not for the purpose of making any profit, either directly or indirectly, but merely for the purpose of covering the outlay in the purchase thereof by the corporation, and the expense attendant upon the keeping and serving thereof at the club-house. It is further agreed, that at the time and place stated in the indictment, *Moses H. Springer*, who is a member of 'the *Concordia*,' called for a glass of beer in the usual way, was served by the steward, drank it then and there, and paid five cents therefor, that being the price fixed by the corporation.

"The members are admitted to the club-house, by the use of a latch key, with which each is provided, and that they use the club-house in some measure as a home, except for lodging, and that they spend much of their time there every day.

"The association pays annually \$1200, taxes on building, \$1100 insurance, and \$2500 ground-rent. Its members are regularly elected, and none but members enjoy the use of the club-house for social purposes."

The question arising upon this statement of facts, is whether the beer furnished to Springer, a member of the association, in the manner before stated, was a sale thereof, within the meaning of the Act of 1866. This Act came before this Court for construction in *State vs. Popp*, 45 Md., 432. The appellee was indicted for selling lager beer on Sunday, and pleaded in bar, "that the prosecution against him was not commenced *within one month* after the fact charged in the indictment. The

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Criminal Court decided that the plea was a good defence, because by sec. 11, Art. 57, of the Code, it is provided, that "all actions or prosecutions for blasphemy and *Sabbath breaking* or drunkenness, shall be made within *one month* after the fact." But this Court after a careful examination of the Acts of Assembly, from which the several sections of the Code, in *Article 30*, were derived, decided that sections 179 and 180, and the Act of 1866, by which they were amended and re-enacted, were not among the provisions against "*Sabbath breaking*," and consequently the limitation prescribed by *Art. 57, sec. 11*, had no application, but that the case fell under the provisions of *sec. 10, Art. 57*, which prescribes a limitation of *one year* within which the prosecution must be commenced.

The Court said that by the legislation of the State, a distinction had been drawn in terms, between the offence of "*Sabbath breaking*," and that of selling liquor on the Sabbath day. "They were originally distinct offences, and have not been made one, by being placed under the same *heading* in the Article relating to 'Crimes and punishments.'

"It may be true that in the common acceptation of the terms, he who sells liquor on Sunday, breaks the Sabbath, but so also does he who works and labors on that day, and when the Legislature has made a distinction as to the time within which prosecutions for the two acts must be made, the Courts have nothing to do but to enforce that distinction."

It follows from that decision, that the offence charged in this case is not that of "*Sabbath breaking*," but that of *selling beer on Sunday*, which, (or the selling of any other article of merchandise on that day) is the specific offence forbidden by the Act of 1866.

After a careful consideration of the facts set out in the agreed statement, we are all of opinion that the transac-

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tion was not a *sale* of beer to Springer, within the intent and meaning of the Act of 1866. In other words we think the Act has no application to a case like the present.

It will be observed that the license laws, *Code, Art. 57*, which forbid the sale or barter of spirituous or fermented liquors without a license, have never been construed as applicable to *social clubs*, of which there are several in Baltimore City, where liquors are procured for the use of the members, and are furnished to them in the manner described in the present case; and we think it very clear that no license is required, for the reason that such a transaction is not a *sale* within the meaning of the license laws. And by a parity of reason, we conclude that the members of such associations as "the Concordia" is admitted to be, who obtain refreshments and liquors at the club, by paying into the common fund the price fixed by the regulation of the society, cannot be said in any sense to buy them from the corporation, nor can the corporation be said to *sell* them to the members, within the meaning of the Act of 1866.

It is argued by the Attorney-General that the liquors, and other supplies are purchased by the corporation, and are consequently its property; and when furnished to a member, it is sold to him, and if the sale is made on Sunday it is an offence within the Act of 1866. But that Act equally prohibits the sale of any article of merchandise whatsoever on Sunday, and if the argument of the appellee be sound, the society could not furnish a meal to a member on Sunday, without violating the law, and subjecting itself or its officers to the penalties prescribed by the Act of 1866. We do not so construe the law. The society is not an ordinary corporation; but a voluntary association or club united for social purposes,—each member must be elected, and each is joint owner of the property and assets, and entitled to the privileges of the society as long as he remains a member. Among these

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privileges is that of partaking of the provisions and refreshments provided for the use of the members. These are not sold to him by the corporation, but furnished to him by the steward, upon his paying into the common fund, what is equivalent to the cost of the article furnished, and what is so paid is expended in keeping up the supply for the use of the members. Such a transaction is not a barter or sale in the way of trade, and therefore not within the purview or meaning of the Act of 1866.

*Judgment reversed.*

(Decided 16th March, 1881.)

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AUGUST WILLIAM LEWIS BECKER vs. ISAAC WHITEHILL, JR.

*Practice—Plea of Discharge under the Insolvent Laws—Form of Judgment for Defendant—Art. 48, of the Code.*

In an action of *assumpsit* for goods bargained and sold, the defendant pleaded his discharge under the Insolvent Laws. To this plea the plaintiff filed a replication of *nul tiel record*. **HELD:**

That the issue upon the replication was one solely for the determination of the Court, and if the Court found upon an inspection of the record of proceedings in insolvency, that the defendant had been discharged under the Insolvent Laws, judgment should be entered for the defendant, without qualification; and that the plea of discharge in insolvency being a bar to the action, the right and remedy of the creditor would be against the trustee in the Insolvent Court.

In providing that judgment creditors may take in execution property of the insolvent not mentioned in the schedule, and thereby acquire priority in the proceeds of such property, the Code, Art. 48, means creditors who have obtained judgments against the insolvent, prior to the filing of his petition, because under the plea of discharge in insolvency, no judgment can be recovered against him.

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APPEAL from the Superior Court of Baltimore City.

The case is stated in the opinion of the Court. The judgment of the Court below was, for the plaintiff for \$162, with interest thereon from date until paid and costs, subject to the defendant's discharge in insolvency.

The cause was argued before BOWIE, GRASON, MILLER, ROBINSON and IRVING, J.

*Lewis Hochheimer*, for the appellant.

*M. Star Weil*, for the appellee.

ROBINSON, J., delivered the opinion of the Court.

In an action of *assumpsit* for goods bargained and sold, the appellee pleaded his discharge under the insolvent laws.

To this plea, the appellant filed a replication of *nul tiel record*. The issue upon the replication was one solely for the determination of the Court, and depended entirely upon the record of proceedings in insolvency. If the Court found upon an inspection of the record that the appellee had been discharged under the insolvent laws, the judgment should have been entered for the defendant, without any qualification. The discharge was a bar to the action. Being then an issue solely for the determination of the Court, we must in view of the Judge's certificate treat it in this appeal, as having been decided by the Court, and not, as the appellant contends, submitted to the finding of the jury.

Where the defendant pleaded his discharge under the insolvent laws, it was the practice under the Act of 1805 and its supplements, to enter the judgment for the defendant, *subject to his discharge in insolvency*, because property subsequently acquired by the insolvent in the manner prescribed by the Act, still remained liable in his hands

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for the payment of antecedent debts. By the Act of 1834, ch. 293, such property was vested in the trustee and not in the insolvent, and creditors were required to pursue their remedies against the trustee in the insolvent Court. Accordingly in State use of *Buckey vs. Cutter*, 18 Md., 418, where the judgment was entered for the defendant, under a plea of discharge in insolvency, the plaintiff appealed, and contended that the judgment ought to have been entered subject to the defendant's discharge under the insolvent laws. The Court, however held, that under the Act of 1834, the plea was a bar to the action, and the judgment was therefore properly entered for the defendant.

Under the Code, Art. 48, "all the property of every description, rights and claims of the insolvent," whether named in the schedule or not, *vest in the trustee* for the benefit of creditors, and the discharge of the insolvent releases him from "all debts and contracts made before the filing of his petition."

It provides it is true, that property not mentioned in the schedule, and not exempted by law, may be taken under a *fieri facias* or *attachment* at the suit of any creditor, but it also expressly declares, that the right and title of the trustee to such property shall not in any manner be thereby impaired, and that the execution shall only operate to give the judgment creditor, who shall discover such property a *priority* to be paid out of the proceeds thereof.

The property of the insolvent of every kind is thus vested in the trustee, and his discharge releases him from all debts contracted prior to his application for the benefit of the insolvent laws. The rights and remedies of creditors must therefore be pursued against the trustee in the Insolvent Court.

The provisions of the Code in this respect are the same as the provisions of the Act of 1834, and under the decision in *Buckey's Case* the plea of discharge in insolvency

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is a bar to the action. The judgment in such cases should be entered for the defendant, and not entered subject to his discharge under the insolvent laws.

In providing that judgment creditors may take in execution property of the insolvent not mentioned in the schedule, and thereby acquire priority in the proceeds of such property, the Code means creditors who have obtained judgments against the insolvent prior to the filing of his petition, because under the plea of discharge in insolvency no judgment can be recovered against him.

The judgment below must be reversed and final judgment entered by this Court for the defendant.

*Judgment reversed, and  
judgment for defendant.*

(Decided 16th March, 1881.)

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GEORGE G. HAMMOND, and others vs. CHARLES LEWIS  
HAMMOND, and others.

*Construction of a Conditional Bequest—Condition Subsequent—  
Extrinsic Evidence—When a Will takes effect.*

The will of W. B. H. contained an item bequeathing to his brother C. L. H., "the sum of twenty five hundred dollars, secured by a mortgage from W. H., for that, he, the said C. L. H., shall look after and take care of our beloved brother R., while he shall live, and bury him at his death." It appeared, that at the time W. B. H. was about to make his will, R. was sick, and W. B. H. asked C. L. H. for what sum of money he would take care of R. and bury him at his death, and that C. L. H. agreed to perform said services for the amount willed to him; that C. L. H. accordingly took charge of R., who was at his house, and buried him at his death, which happened before that of the testator. In a proceeding in equity to obtain a construction of the will, it was HELD:



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That the condition annexed to the bequest to C. L. H., was a condition subsequent, and its performance becoming impossible by the act of God, he took unconditionally.

Extrinsic evidence in the interpretation of wills, is admissible, not to show what the testator meant, as distinguished from what his words express, but simply what is the meaning of his words.

A will speaks from the death of the testator, and not from its date, unless by a fair construction its language indicates the contrary intention.

APPEAL from the Circuit Court of Baltimore City.

The case is stated in the opinion of the Court.

The cause was argued before BOWIE, MILLER, ROBINSON and IRVING, J.

*Charles Marshall*, for the appellants.

*Sebastian Brown*, for the appellee.

BOWIE, J., prepared the following opinion in his lifetime, and the same being concurred in after his decease by the Judges who participated in the hearing, it was filed as the opinion of the Court.

The appellants filed their bill of complaint in the Circuit Court of Baltimore City against the appellees, for the purpose of ascertaining and establishing the true construction of the will of William B. Hammond, late of said city, deceased. They allege that the testator died on or about the 23rd day of May, 1877, leaving a last will, which has been duly admitted to probate in the Orphans' Court of Baltimore City, and Charles Lewis Hammond, (one of the appellees,) executor named therein, has duly qualified as executor, and obtained letters testamentary thereon.

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It is further charged, that by one of the clauses of the will, the testator bequeathed to his brother, the said Charles Lewis Hammond, "the sum of twenty-five hundred dollars, secured by a mortgage from William Huddleson of Montgomery County, for that he the said C. Lewis Hammond, shall look after and take care of our beloved brother Rezin, while he shall live, and bury him at his death."

They allege, "that the brother Rezin mentioned in said clause, died before the testator, and they are advised, and claim that by the true construction of the above recited clause of said will, which was intended to make provision for said Rezin, the sum of twenty-five hundred dollars is not bequeathed in trust for said Rezin, but that it is a certain sum left to the said Charles Lewis Hammond, as the consideration of the assumption by him of the care of said Rezin while living, and burying him when dead; and that the said C. Lewis Hammond, would not be entitled to said legacy, unless he should, after the death of the testator assume said duties, and in case he should accept said legacy, his obligation to perform said offices in favor of said Rezin, would be entirely independent of the amount of said bequest, and would be co-extensive with the life of said Rezin, without reference to the amount that might have to be expended in discharging said offices."

The complainants claim, therefore, that by the death of said Rezin, before the testator, the said C. Lewis Hammond was prevented from performing the condition on which he was to have said legacy, and is no more entitled to the same than he would have been had said Rezin survived the testator, and the said C. Lewis Hammond refused to assume the performance of the duties towards said Rezin, mentioned in said will.

It is further charged that Charles Lewis Hammond has collected the money mentioned in said above cited

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clause of the will, and refuses to distribute the same among the persons entitled thereto, although all the debts of the estate have been paid, and more than a year elapsed since the granting of the letters testamentary. That although there is no general residuary clause in the will, there is a special residuary clause which includes all *choses in action*, and they are advised that by failure of the above bequest, the said sum of \$2500 passed to the persons named in said residuary clause, viz., the complainants, brothers and sisters of the testator.

The bill prays that the construction of the will set forth therein, may be declared the true construction, and the executor required to charge himself accordingly with the \$2500 and interest, and pay over to the complainants their respective shares.

A copy of the will, duly authenticated, is filed with the bill, marked Exhibit A.

The answer of Charles Lewis Hammond, in his own right, and as executor, was filed, admitting

1st. The execution of the will, the death of William B. Hammond, the granting of letters testamentary to him, the respondent, and the collection of the money.

2nd. That the will contains the clause specifically set forth in the bill of complaint, but denies that the true intent and meaning of the language of said clause is set forth in the bill.

Further answering the respondent says, "that at the time the testator was preparing to have said will written, he asked the respondent, for what sum of money he would agree to look after and take care of Rezin Hammond as long as the said Rezin should live, and bury him at his death, and the respondent in answer thereto, and in the presence of witnesses, agreed to perform said services for such sum of money as the said William B. Hammond would devise to the respondent for that purpose. That at the time of this conversation the said Rezin Hammond

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was sick and very feeble, all of which was well-known to the said William B. Hammond, and it was also known to the said deceased, that this respondent was a poor man with a large family of young children upon his hands, and he knew at the time of making said will, that the said Rezin was at the house of the respondent confined to his bed. And the respondent further says, he knew of the devise to him of said \$2500 mentioned in the bill and of the conditions connected therewith, and that under and by virtue of said devise he looked after and took care of the said Rezin Hammond as long as he lived, and buried him at his death, and that he did agree with the said William B. Hammond to look after and take care of the said Rezin, and bury him at his death in consideration of said devise, and if said devise had not been made he was not able to, and could not have maintained said Rezin."

The respondent further contends that the testator survived the said Rezin, and although, he was in possession of his faculties and had ample opportunity to revoke said bequest, never did so, and never contemplated it, and it was not in his power to make a valid revocation of said bequest.

That apart from the agreement aforesaid, the devise took effect at the time of the execution of the will, and the respondent was to receive the sum of \$2500 irrespective of the time said Rezin Hammond should die, provided the respondent from the execution of said will should look after, take care of and bury said Rezin, which he avers he did. These citations from the bill and answer foreshadow and present substantially the conflicting views of the appellants and appellees, which are set out more in detail in the briefs, and arguments of the counsel for the respective parties.

The appellants contend that the will is to be construed as speaking from the death of the testator, and that as the bequest was given in consideration that he should

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take care of Rezin Hammond and bury him when he died, "it follows, that on the death of Rezin before the testator, the bequest fails."

The appellee's theory is, that the will is to be taken as speaking from the date of its execution, although it does not operate until the testator's death; and if construed, as speaking from the death of the testator, then the condition being a condition subsequent and becoming impossible, the bequest vested unconditionally in the legatee.

A commission was issued and returned, under which the testimony of the draughtsman of the will and other witnesses as to the declarations of the testator, prior to and at the time of the execution of the will, were taken.

To all of which testimony the appellants excepted, on the ground of irrelevancy.

In order to discover the intention of the testator, it is the duty of the Court to put themselves in the place of the testator, and then see how the terms of the will affect the property or the subject-matter. 1 *Greenleaf's Evid.*, part II, sec. 287.

In the 5th proposition of Vice-Chancellor WIGRAM's rules of interpretation of wills, it is said "for the purpose of determining the object of the testator's bounty, or the subject of disposition or the quantity of interest intended to be given by his will, a Court may inquire into every material fact relating to the person who claims to be interested under the will." 1 *Greenleaf's Evid.*, *id.*, note 1.

Lord ABINGER's opinion in the case of *Hiscocks vs. Hiscocks*, 5 *M. & W.*, 363, 367, incorporated by Greenleaf in his chapter on the admissibility of parol evidence, as the most luminous exposition and exhaustive essay on the subject, states that "all the facts and circumstances, therefore, respecting persons or property, to which the will relates, are undoubtedly legitimate, and often necessary evidence to enable us to understand the meaning and application of his words." 1 *Greenleaf*, sec. 289.

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The same doctrine is announced by this Court in the case of *Hawman & Wife vs. Thomas, Ex'r*, 44 Md., 43, where it is said: "The only object and purpose for which such proof can be properly admitted, is, not to show what the testator meant, as distinguished from what his words express, but simply what is the meaning of his words." See *Walston's Lessee vs. White*, 5 Md., 297. To the same effect is the language of SHAW, C. J., in *Tucker vs. Seaman's Aid Society*, 7 Metcalf, 205. "Extrinsic evidence is admissible only when the will is plain and clear upon its face, and becomes doubtful when applied to the subject-matter." *Allen's Ex'rs vs. Allen*, 18 Howard, 393.

The doubt in this case arises not from any obscurity or ambiguity on the face of the will, but from the contest as to the rules of construction to be applied, and the class of conditional bequests to which it belongs, whether precedent or subsequent.

The rule of interpretation, as to the period of time from which the will speaks, both in this State and in England varied formerly, with the subject-matter to which it applied. As to real estate, it was supposed to speak (or operate) only on such lands, etc., as the testator held at the date or execution of the will, but as to personalty, it operated upon all he owned at the time of his death. Although, generally, as testamentary instruments they were construed as speaking from the time and event by which they became consummated, the death of the testator, there was no invariable rule, except as determined by the species of property bequeathed or devised. Thus Jarman, speaking of wills generally, says, "for some purposes a will is considered to speak from its date or execution, and for others from the death of the testator, the former being the period of its inception, and the latter, that of the consummation of the instrument." 1 *Jarman*, 292, (3rd Amer. Ed.)

In the summary of his rules for construction, it is said, "that a will speaks, for some purposes, from the period of

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execution, and for others, from the death of the testator ; but never operates until the latter period." *Rule IV*, 2 *Jarman*, p. 741 in *Mar.*, (3rd Amer. Ed.) The general rule, however, as we have before intimated is, "that a will speaks from the death of the testator, and not from its date, unless its language, by a fair construction, indicates the contrary intention." *Canfield vs. Bostwick*, 21 *Conn.*, 550 ; *Gold vs. Judson*, 21 *Conn.*, 616.

Adopting the general rule of construction, we proceed to inquire whether the bequest under consideration comes within the class of legacies upon condition precedent, or legacies upon condition subsequent.

It was said by WILLES, C. J., in *Acherley vs. Vernon*, "that no words necessarily made a condition precedent, but the same words would make a condition either precedent or subsequent, according to the nature of the thing and the intent of the parties." *Willes' Rep.*, 153. *Gillett vs. Wray*, 1 *P. Wms.*, 384 ; *Harvey vs. Aston*, 1 *Atk.*, 361 ; 4 *Kent*, (5th Ed.) 124, 125 ; 7 *G. & J.*, 240, *et al.*, cited in note 1, 1 *Jar. on Wills*, p. 798. The item of the will under consideration is a specific bequest for a particular purpose to be accomplished *in futuro*, without any disposition over, in case of non-performance. It closely resembles the case of *Thomas vs. Howell*, 1 *Salk.*, 170, where one devised to his eldest daughter on condition that she should marry his nephew on or before she attained twenty-one years. The nephew died young, and after his death, the devisee being then under twenty-one, married another.

It was held, that the condition was not broken, its performance having been impossible by the Act of God. 1 *Jarman*, 808, in *Mar.*

Without multiplying examples, which are numerous, the condition annexed to this bequest is both in the collocation of its language and the order of events so clearly posterior to the vesting of the legacy, that we have no difficulty in declaring it a condition subsequent, and its

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performance becoming impossible by the Act of Providence, the legatee takes unconditionally.

*Decree affirmed, with  
costs to the appellee.*

(Decided 16th March, 1881.)

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JOSEPH HAMPSON *vs.* JOHN A. OWENS, use of CHARLES  
W. STOW.

*Suit by Assignee of a Chose in Action—Art. 9, sec. 1, of the  
Code.*

Where the entire and exclusive interest in a bill of exchange or other negotiable *chose in action* is vested in the holder thereof, he cannot institute an action upon it in the name of another party. Assignments of other *chooses in action* not negotiable, entitle the assignee to sue in the name of the assignor for the use of the assignee, or in his own name by virtue of Art. 9, sec. 1, of the Code.

APPEAL from the Baltimore City Court.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., BOWIE, MILLER, ROBINSON and IRVING, J., for the appellee, and submitted for the appellant.

*Geo. Morris Bond*, for the appellant.

*Geo. G. Hooper*, for the appellee.

BOWIE, J., prepared the following opinion in his lifetime, and the same being concurred in after his decease



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by the Judges who participated in the hearing, it was filed as the opinion of the Court.

Suit was instituted on the 10th of July, 1879, in the Baltimore City Court, by the appellee, (in the name of John A. Owens, use of Charles W. Stow,) against Joseph Hampson and John W. Backer, co-partners, trading as the Baltimore Lock Works.

The *narr.* contained the common counts, viz., 1st, for money payable by the defendants to the plaintiff for goods bargained and sold; 2nd, for work done and materials provided; 3rd, for money lent; 4th, for money paid by the plaintiff for defendants; 5th, for money received by defendants, for the use of the plaintiff; and 6th, for money found due from the defendants to the plaintiff on accounts stated between them, and claimed \$1200 damages.

With the *narr.* was filed an account of the tenor following:

“Baltimore, Sept., 14, 1876.

“Baltimore Lock Works.

“To John A. Owens, Dr.

“To engine, boiler, shaft and hangers.....\$600.00

“For value received, I hereby assign to Charles W. Stow my account, dated Sept. 14, 1876, for \$600, against the Baltimore Lock Works, (composed of Joseph Hampson and John W. Backer, co-partners,) for an engine, boiler, shafting and hangers, sold to said firm said date.

“John A. Owens.” [SEAL.]

The appellant, Hampson, appeared and pleaded that he never was indebted as alleged; 2nd, that he did not promise as alleged.

Judgment by default for want of a plea, was entered against John W. Backer.

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Issue being joined on the pleas of the defendant, Hampson, a jury was sworn, and verdict found for the plaintiff, whereupon the appellant moved in arrest of judgment, for various reasons assigned, which motion being overruled, and judgment entered on the verdict, this appeal was taken.

The appellant's counsel in his brief, after stating in detail the reasons assigned in support of his motion in arrest, sums up their substance and object as follows:

"The question intended to be presented to the Court of Appeals, is simply whether or not, *since the enactment of the provisions embodied in sec. 1, Art. 9, of the Code*, a party who has assigned in writing, a *chose in action*, and thus parted with all interest therein, legal or equitable, can sue in his own name to the use of the assignee, as has been done in this case. The appellant respectfully maintains that he cannot. Although no case appears to have been presented to the Court, under sec. 1st, of Art. 9, of the Code, yet it is respectfully submitted, that the principle governing such cases as the one now submitted has been clearly laid down in the decisions below referred to—citing *Whiteford vs. Buckmyer*, 1 Gill, 145; *Bowie, use of Ladd vs. Duvall*, 1 G. & J., 175; *Canton Nat. Building Association vs. Weber*, 34 Md., 671."

The position of the parties in this statement is unintentionally reversed. It is not the case of an assignor suing in his own name, to the use of the assignee, but that of the assignee suing in the name of the assignor for the use of the assignee.

"*Choses in action* could not be assigned or granted over at common law, because it was thought to be a great encouragement to litigiousness if a man were allowed to make over to a stranger his right of going to law, therefore, the assignment is in the nature of a declaration of trust and an agreement to permit the assignee to make use of the name of the assignor in order to recover possession. And

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when in common acceptance, a debt or bond is said to be assigned over, it must still be sued in the original creditor's name." *Blac. Com., Book 2, ch. 30, p. 442.*

Promissory notes and bills of exchange, by certain statutory provisions, may be transferred by endorsement and delivery. *Ibid*, 468.

The Act of 1829, ch. 51, (Art. 9, sec. 1 of the Code, and sec. 41, Art. 64 of the Revised Code,) was designed to enlarge the right of action on *choses in action* therein described, so that the assignee, *bona fide* entitled thereto by assignment in writing, might by virtue of the assignment maintain an action in his own name against the debtor therein named, in the same manner as the assignor might have done before the assignment.

"Any defendant may make the same legal or equitable defence, as might or could have been had or maintained against the assignor at the time of such assignment, and before notice thereof."

This Act has never been construed as repealing or abolishing the common law right of suing in the name of the assignor.

In the case of *McNulty vs. Cooper*, 3 G. & J., 214, it was held the blank endorsement and delivery of a bond entitled the holder to recover the amount due by suit in the name of the assignor.

In the case of *Canfield, et al. vs. McIlwaine, use of Wood*, 32 Md., 100, the action was brought by an assignee of an assignee, on a due bill in the name of the first assignee. This Court said in that case, "Art. 9, sec. 1 of the Code, does not *require*, but *authorizes* the assignee of a *chose in action* to sue in his own name."

The language of the Court in the case of *Whiteford vs. Burkmeyer*, 1 Gill, 127, from which a contrary inference is drawn by the appellant's counsel, must be taken in connection with the cause of action, which was a bill of exchange, in which the whole interest legal and equitable

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passed by endorsement and delivery. Of such *choses in action*, the Court said, "where the entire and exclusive interest in a bill is vested in the holder thereof, he cannot institute an action upon it in the name of another party."

Assignments of other *choses in action* not negotiable, entitle the assignee to sue in the name of the assignor, for the use of the assignee, or in his own name by virtue of the Code. The motion in arrest of judgment was properly overruled and the judgment below will be affirmed.

*Judgment affirmed.*

(Decided 16th March, 1881.)



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On the 25th July, 1877, L. & C. drew on H.: "you will please pay to E. & Q. \$2583, to be taken from amount of purchase money of the house purchased by you, when they have entirely completed their contract dated June 18th, 1877." Across the face H. on the 26th July, wrote: "Accepted; payable when due under the contract, out of the purchase money." At the same time E. & Q. receipted as follows: "Received of H. his acceptance of L. & C's order of \$2583, payable when due under the contract out of the purchase money of \$4500." On the 16th February, 1878, L. & C. endorsed on the draft: "The contract of E. & Q. dated June 18th, 1877, for painting, glass and glazing of nine houses on North Boundary avenue, is completed to our entire satisfaction, according to their specifications." The acceptor refused to pay the draft, and in the action against him, he offered evidence of a contract other than that referred to on the draft, between him and the drawers, and of which the payees had no knowledge. **HELD:**

That no such evidence was admissible; and that the acceptor was liable. *Hunting vs. Emmart & Quartley*, 265.

## ACKNOWLEDGMENT OF MORTGAGE.

Where in a proceeding to obtain an injunction against the sale of mortgaged premises under a decree, on the ground that the mortgage, though regular on its face, was not acknowledged as it purported to be before a justice of the peace, and the justice being examined as a witness, and looking at the original mortgage filed in the case, identified his signature as a witness and said, he saw each of the parties sign the same, and identifying his signature as a justice of the

ACKNOWLEDGMENT OF MORTGAGE.—*Continued.*

peace to the certificate endorsed on the mortgage, said he took the acknowledgment of the mortgagors, husband and wife, at their house on a certain street, naming it, and the mortgagors denied that the justice was ever at their house, and the mother of the wife corroborated them, credit should be given to the justice, rather than to those who would repudiate their own acts. *Ramsburg vs. Campbell*, 227.

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- 1854, ch. 193. Insolvent Law. 98.
- 1856, ch. 154. Conveyancing Act. 311.
- 1860, ch. 91. Limitation to collection of taxes. 461.
- 1860, ch. 308. Right of peremptory challenge. 465.
- 1861, ch. 94. Limitation to collection of taxes. 461.
- 1862, ch. 49. Married women. 100.
- 1864, ch. 6. Summary judgments in Baltimore City. 481.
- 1864, ch. 109. Relating to evidence. 475, 503.
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- 1864, ch. 346. Inspection of tobacco. 258.
- 1865, ch. 23. Amending the charter of the Concordia. 568.
- 1866, ch. 66. Sunday law. 567.
- 1867, ch. 223. Married women. 100.
- 1867, ch. 343. Incorporating the Beneficial Society of the Labor-  
ing Sons of Frederick City. 8.
- 1868, ch. 116. Relating to evidence. 475.
- 1868, ch. 407. Relating to public education. 148.
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- 1870, ch. 291. Inspection of tobacco. 258.
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more to issue bonds. 142.
- 1870, ch. 476. Railroad Law. 160, 174.
- 1872, ch. 36. Inspection of tobacco. 259.
- 1872, ch. 40. Right of peremptory challenge. 465.
- 1872, ch. 213. Mortgages to secure advances. 110.
- 1872, ch. 270. Married women. 100.
- 1872, ch. 316. Appeals in criminal cases. 353.
- 1872, ch. 329. Defaulters to the State. 353, 359.
- 1872, ch. 346. Ejectment. 296.
- 1872, ch. 377. Relating to public education. 147.
- 1874, ch. 202. Railroad law. 160.
- 1874, ch. 446. Relating to railroad crossings. 160.
- 1874, ch. 483. Revenue and taxes. 459, 462.
- 1876, ch. 242. Railroad Corporation Law. 176.
- 1876, ch. 249. Registration of voters. 39.
- 1876, ch. 357. Relating to evidence. 475.
- 1878, ch. 106. Relating to insurance companies. 493.
- 1878, ch. 192. To enlarge the powers of the Pennsylvania Rail-  
road Company in Maryland. 160.
- 1880, ch. 253. Married women. 100.
- 1880, ch. 273. To prohibit the payment of employes of certain  
corporations in Allegany County, otherwise  
than in legal tender money of U. S. 75.

**ACTS OF ASSEMBLY, CONSTRUCTION OF.**

1. The Act of 1880, ch. 273, entitled an Act to prohibit the pay-  
ment of employes of certain corporations operating in  
Allegany County, otherwise than in legal tender money of  
the United States, though a valid exercise of power by the  
Legislature, so far as it affects the corporations therein  
designated, does not conflict with Art. 9 of the Code,  
relating to the Assignment of Choses in Action. This Act



ACTS OF ASSEMBLY, CONSTRUCTION OF.—*Continued.*

was not intended to restrict, nor does it restrict the powers of the employes of a corporation engaged in mining and manufacturing in Allegany County and employing more than ten hands, so as to prevent their assigning what was due them from the corporation by orders drawn on the corporation in favor of merchants who had sold them goods, said orders specifying that the amounts due the merchants should be deducted from moneys due the employes by the corporation for wages, and be paid to the merchants for their account, and authorizing the merchants to receipt in the employes' names for the amounts so paid, and which orders were accepted by the corporation. *Shaffer & Munna, vs. Union Mining Co.*, 74.

2. This Act being a penal Statute, and intended to be in the interest of the employé, it is not restrictive of the employé's rights, except in so far as it prevents him or the holder of his assignment of wages from colluding with the employer to do what the law has forbidden any corporation as is therein described from doing. *Id.*
3. In 1869, J. was elected a member of the Board of County School Commissioners of Montgomery County, under the Act of 1868, ch. 407, and in 1872, 1874, 1876 and 1878, he was appointed a member of that Board by virtue of the Acts of 1870, ch. 311, and 1872, ch. 377, by the Judges of the Circuit Court for that County. He acted as president of the board for those years, till displaced by the appointment of some one else in his stead, as a member. A. was elected as the secretary, treasurer and examiner of the same board with J. in 1870, and appointed to that office in the same way and for the same years as J., and acted as such officer for those years, till displaced by the appointment of some one else in his stead. He never gave bond under his new appointments, but discharged the duties of the office. On a bill filed by J. and A. claiming to be respectively president, and secretary and examiner of the board, suing for themselves and in behalf of citizens of the county interested in the promotion of education, for an injunction against the board composed of the appellees appointed by the Judges in 1879, alleging the unconstitutionality of the Acts of 1870, ch. 311, and 1872, ch. 377, and claiming that the said J. and A. and the board elected in 1869, held over under the Act of 1868, ch. 407, it was HELD :

- 1st. That the Board of County School Commissioners being a corporation under the Acts relating to Public Education, suit could only be brought in its name.

ACTS OF ASSEMBLY, CONSTRUCTION OF.—*Continued.*

- 2nd. That J. and A. were equally estopped from repudiating the authority and title under which they acted after their appointment under the Acts of 1870 and 1872, and from setting up independent and paramount titles to their offices by reason of their election in 1869.
- 3rd. That as parts of and as representing the community at large of the county, they were not entitled to the Court's interposition. *Jones and Anderson vs. Keating, et al.*, 145.
4. Under the Act of 1878, ch. 192, entitled, an Act to enlarge the powers of the Pennsylvania Railroad Company in Maryland, the appellant had the power, upon complying with the requirements of that Act, to construct its road across the Potomac Wharf Branch of the Cumberland and Pennsylvania Railroad, on the west side of Wills' Creek, and then to cross over the creek to its east side. But as the appellant was not justified in making its crossing over the Potomac Wharf Branch forcibly, and against the consent of the appellees, without a written agreement between them conferring the easement on the appellant, which agreement was not executed, the appellees were entitled to an injunction restraining the appellant from using said crossing over the Potomac Wharf Branch. *Pa. R. R. Co. in Md. vs. Consol. Coal Co. and C. & P. R. R. Co.*, 158.
5. The appellant was indicted for violating the Tobacco Inspection Laws, in that, being a grower of tobacco, he packed a certain quantity of such tobacco in a hogshead of unknown dimensions and exported it to Bremen, without having such hogshead of tobacco inspected and passed according to the laws of this State; and in that he did not pay the outage due the State on the tobacco thus exported. On the demurrer of the appellant, it was HELD:
- 1st. That the Act of 1872, ch. 36, entitled an Act to add a new Article to the Code of Public General Laws regulating the Inspection of Tobacco, which repealed all Acts or parts of Acts inconsistent with its provisions, did not modify or repeal sec. 41 of the Act of 1864, ch. 346, as modified by the Act of 1870, ch. 291, which constituted part of the Public Local Law; and that under that section it was the duty of the appellant to have delivered the tobacco packed by him, to one of the State tobacco warehouses, in order that the inspectors might ascertain whether it was packed in hogsheads of the proper dimensions, and whether it was packed in the

**ACTS OF ASSEMBLY, CONSTRUCTION OF.**—*Continued.*

county or neighborhood where it was grown, and marked as the statute directed.

2nd. That the charge of outrage was not in contravention of the Constitution of the United States, which prohibits any State from levying a tax on imports or exports, except so far as such tax may be absolutely necessary for the execution of its inspection laws.

3rd. That the appellant was liable to the fine imposed by the Court below, being the penalty prescribed by the Act of 1864, ch. 346, sec. 41. *Turner vs. The State*, 240.

6. On a motion made by the defendant at the same term to strike out a judgment extended on a judgment by default in a Court of Baltimore City, for surprise and irregularity, it appeared that the affidavit required by the Act of 1864, ch. 6, (to entitle the plaintiff to a summary judgment.) to be filed at the bringing of the suit, was made by the plaintiff's book-keeper, and not by the plaintiff himself. **Held:**

That, the affidavit being insufficient, the judgment should be struck out, and the defendant let in to plead, that the case might be tried on its merits. *De Atley vs. Senior*, 479.

7. The Act of 1866, ch. 66, known as the Sunday Liquor Law, does not apply to The Concordia, a club of Baltimore City. *Seim, et al. vs. The State*, 566.
8. Selling beer on Sunday is not Sabbath-breaking within the meaning of the Act of 1866, ch. 66. *Id.*
9. The License Laws for sale of liquors in Art. 56, of the Code, do not apply to social clubs.

**See CODE, CONSTRUCTION OF THE.**

CONTRACTS, 8.

DISTRESS.

EJECTMENT, 2.

HUSBAND AND WIFE, 3.

INSOLVENT LAWS.

MARRIAGE, 1.

PRACTICE IN CRIMINAL CASES, 3, 4, 6, 7, 8, 10, 13.

TAXATION, 2, 3, 4.

SUBSCRIPTION TO STOCK.

**ADMINISTRATION.**

*See* ORPHANS' COURT, 6, 7.

POWERS, 1.

**ADVERTISEMENT.**

*See* DISTRESS, 3.

MORTGAGES, 3, 4.

**AFFIDAVIT.**

*See* ACTS OF ASSEMBLY, CONSTRUCTION OF, 6.  
PRACTICE IN CRIMINAL CASES, 4.

**AGENT.**

*See* CONTRACTS, 8.

**ALLEGANY COUNTY.**

*See* ACTS OF ASSEMBLY, CONSTRUCTION OF, 1, 2.

**ALMANAC.**

*See* EVIDENCE, 2.

**ANNUITY CHARGED ON LAND.**

An annuity having been charged by will on several parcels of real estate devised to one person, the right of the annuitant to enforce the charge against any or all of the property devised, can be waived only by agreement on the part of the annuitant, and is in no manner affected by deeds, mortgages or transactions to which the annuitant was not a party. *Perkins and Wife vs. Emory*, 27.

**APPEAL.**

1. Where on a former appeal a cause had been remanded by this Court to have an account reformed and re-stated, an appeal subsequently prayed from an order of the Court below "ratifying an auditor's account stated the 10th July, 1880, under an order of Court passed the 7th June, 1880, and from all action had herein respecting the said account and the distribution therein made, and all proceedings subsequent to the remanding of the cause by the Court of Appeals," was well taken under secs. 21 and 22, of Art. 5, of the Code, as such prayer of appeal embraced an appeal from the order of the Court below, whereby the exceptions to a former audit were passed upon, and the audit stated in accordance with the appellant's instructions was set aside, and the opinion of the Court establishing the principles by which the audit was to be controlled, and the question of right between the parties was settled; these being proceedings had in the cause after it was remanded from this Court. *Reiff vs. Horst, et al.*, 42.
2. The discharge of a receiver furnishes no ground of appeal. Nor does the rescission of an interlocutory order of sale, which determined no right. *Wash. City and Pt. Lookout R. R. Co. vs. The South. Md. R. R. Co., et al.*, 153.
3. An appeal will lie, under Art. 5, sec. 21, of the Code, from an order directing a sale, but not from an order refusing to

**APPEAL.—Continued.**

authorize a sale before final decree, or from an order suspending or rescinding an interlocutory order of sale. *Id.*

4. The disallowance to a trustee of commissions to which he is entitled is ground of appeal. *Gustav Adolph Build. Assoc. vs. Kratz*, 394.

Rule 4, Respecting Appeals, page 66.

*See* ARBITRATION AND AWARD.

INDICTMENTS, 1, 8.

PRACTICE IN THE COURT OF APPEALS, 2.

PRACTICE IN CRIMINAL CASES, 1, 8.

**APPORTIONMENT.**

*See* ANNUITY.

ORPHANS' COURT, 7.

**ARBITRATION AND AWARD BY JUDGES OF AN ORPHANS' COURT.**

The executor of an estate had a fund of which S. was entitled to a share, unless R. claiming under a deed of trust to him from S. or W. claiming by assignment from S. was entitled to it. The claimants of the share by written agreement submitted the matter to the arbitrament and award of the three Judges of an Orphans' Court, whose judgment and determination should be binding, final and conclusive upon the parties, unless appealed from to this Court within thirty days thereafter by any party aggrieved. On an appeal directly from the award, it was HELD:

1st. That the Orphans' Court, as such, had no jurisdiction in the premises, and that if the reference were to the Judges as an Orphans' Court, under Art. 7, sec. 7, of the Code, and were warranted by the statute, the decision would be final and no appeal would lie.

2nd. That if the reference were to the Judges as individuals, it was an ordinary matter of arbitration and award from which there was no appeal; and that the reservation of the right of appeal in the agreement could confer on this Court no right to hear the case. *Strite and Witmer vs. Reiff, Trustee*, 92.

**ASSETS.**

*See* ORPHANS' COURT, 7.

**ASSIGNEES OF CHOSSES IN ACTION.**

*See* PRACTICE.

**ASSIGNEES' EQUITIES.**

Assignees of notes are entitled to all the equities of the assignors. *Dodge, et al. vs. Stanhope & McLaughlin, et al.*, 114.

**ASSIGNMENT OF ERRORS.**

*See* INDICTMENTS, 1, 3.

PRACTICE IN CRIMINAL CASES, 1, 3.

**AUDITOR.**

*See* APPEAL, 1.

EVIDENCE, 4, 6.

MORTGAGES, 3,

PRACTICE IN EQUITY, 3.

**BALTIMORE CITY STOCK.**

*See* FORGERY, 1, 2.

TAXATION, 3, 4.

**BANKRUPTCY.**

*See* EXECUTOR'S BOND, 1.

INSOLVENT LAWS.

JUDGMENTS.

**BILL OF SALE.**

*See* MORTGAGES, 5.

**BONDS.**

*See* EXECUTOR'S BOND.

FORGERY, 1.

MARSHALLING OF SECURITIES.

**BREACHES OF TRUST.**

*See* CORPORATIONS, 1, 2, 4.

TRUSTS, 2.

**BUILDING ASSOCIATIONS.**

*See* HUSBAND AND WIFE, 4.

MORTGAGES, 3.

**BURIAL LOT.**

*See* TRESPASS, 1.

**CERTIFICATES OF STOCK.**

*See* FORGERY, 1, 2.

TAXATION, 3, 4.

**CHALLENGES.**

*See* PRACTICE IN CRIMINAL CASES, 8, 9, 10.

**CHARGE.**

*See* ANNUITY.

HUSBAND AND WIFE, 4.

## CHOSSES IN ACTION.

*See* PRACTICE.

## CITIZENS.

*See* ACTS OF ASSEMBLY, CONSTRUCTION OF, 8.

## CODE, CONSTRUCTION OF THE.

1. Where a cause is remanded under Art. 5, sec. 28, of the Code, this Court makes no disposition of the costs, which are left to the order and direction of the Court below. *Perkins and Wife vs. Emory*, 27.

2. To an action on a sheriff's bond for fees placed in his hands for collection by a former clerk of the Circuit Court for Allegany County, the defendants, among other pleas, pleaded that the sheriff was unable to collect the fees sued for by distress, execution or otherwise, on account of the plaintiff's failure to make them out in a fair and clear manner, and in words at length as required by law; and that the said fees did not accrue within three years before the sheriff received the same. To these pleas the plaintiff demurred. **HELD:**

1st. That the plea first mentioned was not sufficient; and that a plea to this action should have alleged under Art. 38, sec. 1, and Art. 18, sec. 32, of the Code, that the sheriff was unable to collect the fees, because the persons against whom such fees were chargeable required the accounts to be made out in words at length, of which the plaintiff had notice, and that he had failed within a reasonable time to furnish such accounts as required by law.

2nd. That the other plea would be good under Art. 57, sec. 12, in a suit against a fee debtor; but that as a plea to this action it was defective, as it should have averred not only that the fees did not accrue within three years, but that the parties against whom they were charged refused to pay the same, because they were barred by the statute. *Jamison, et al. vs. The State, use of Rosley*, 102.

*See* APPEAL, 1, 3.

ACTS OF ASSEMBLY, CONSTRUCTION OF.

ARBITRATION AND AWARD.

CONTRACTS, 8.

DEEDS.

DISTRESS, 2, 3, 4.

EJECTMENT, 2.

EXECUTOR'S BOND, 1.

FORGERY, 1.

**CODE, CONSTRUCTION OF THE.—***Continued.*

HUSBAND AND WIFE, 8.  
 INDICTMENTS, 2, 8.  
 INSOLVENT LAWS.  
 MARRIAGE, 1.  
 MARSHALLING OF SECURITIES.  
 MECHANICS' LIEN.  
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 PRACTICE IN CRIMINAL CASES, 3, 4, 6, 7, 8, 10, 13, 14.  
 PRACTICE IN EQUITY, 4-8.  
 SUBSCRIPTION TO STOCK.  
 TAXATION, 2, 3, 4.

**CODE OF PUBLIC GENERAL LAWS.**

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 455.  
 ART. 16, SEC. 129. Where property may be sold before final  
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 the Court of Appeals. 409.  
 ART. 30, SEC. 24. Forgery of bonds, &c. 39.  
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- ART. 48. Insolvent Law. 99, 574.
- ART. 50, SEC. 15. Right of peremptory challenge. 464.
- ART. 56. Licenses. 571.
- ART. 57, SEC. 1. Limitations as to actions. 462.
- ART. 57, SEC. 10. Limitations as to prosecutions, &c. 570.
- ART. 57, SEC. 11. Limitations as to actions, &c. for blasphemy, &c. 570.
- ART. 57, SEC. 12. Limitations as to officers' fees. 104.
- ART. 60, SEC. 8. Power of Courts to determine the validity of marriages. 503.
- ART. 61. Mechanics' Lien. 111, 332, 336, 337, 338.
- ART. 63, SEC. 13. Appraisers of property distrained. 325.
- ART. 75, SECS. 2, 3. Pleadings. 488.
- ART. 81. Revenue and taxes. 459, 461.
- ART. 93, SECS. 11-33. Right of administration. 289.
- ART. 93, SEC. 12. Statement of account. 536.
- ART. 93, SECS. 138, 139, 143. Distribution. 283.
- ART. 93, SEC. 177. Commissions to guardians. 455.
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- ART. 50, SECS. 5, 6, 14, 15. Administrators. 280.
- ART. 64, SEC. 41. Assignment of choses in action. 586.

## CODE OF PUBLIC LOCAL LAWS.

- ART. 4, SEC. 495. Tobacco. 257.
- ART. 4, SEC. 618. Peremptory challenge. 465.
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## COLLECTOR OF TAXES.

*See* PRACTICE IN CRIMINAL CASES, 6, 7, 8.

## COMMISSIONS.

*See* APPEAL, 4.  
 MORTGAGES, 3.  
 PRACTICE IN EQUITY, 4, 5, 6.

## CONDITIONAL BEQUEST.

*See* WILLS, 2.

## CONSTITUTIONAL LAW.

*See* ACTS OF ASSEMBLY, CONSTRUCTION OF, 1, 2, 3, 5.  
 PRACTICE IN CRIMINAL CASES, 7.  
 TAXATION, 1.

## CONTRA PACEM.

*See* INDICTMENTS, 7.

## CONTRACTS.

1. On the 15th May, 1879, at Taneytown, Md., the appellee and the appellant entered into the following contract:

"We have this day contracted with Mr. T. H. Eckenrode, of this place, for the manufacture of two hundred tons of phosphate, by his formula, and to be branded with his brand. The goods to be manufactured between July 15th and July 30th, 1879. T. H. Eckenrode is to superintend the making of it. The goods are sold to him on the following terms, viz: He is to give his notes, one payable the 1st October, 1879, with interest: the other payable the 1st January, 1880, and to bear interest from the 1st October, 1879. The goods are to cost twenty-five dollars per ton. He has the privilege of increasing above order one hundred tons more, if done before the 20th July:" which was signed by the appellee, per "W. C. Matheson, Agt."

"I accept the goods on above terms and conditions:" signed by the appellant.

On the 1st July, 1879, the appellant was at the place of business of the appellee in Baltimore, and went with the appellee's secretary to their manufactory, where a dispute arose as to how the phosphate should be made, he insisting that what is termed the dry process should be followed, and they that the wet process was as good, and it was finally proposed and agreed that a ton should be made by the latter process, so that the appellant could examine it as a sample; on the afternoon of the same day the appellant went to the appellee's office, where their president was also present, and the sample was shown him, and he said he would not have an article of that kind, and would not accept such an article if it was made by the appellee, and that he countermanded his order for making said phosphate by the appellee; the president replied that he would not agree to this, and would hold the appellant to said contract, and that if the appellant would not agree to the appellee's making the phosphate appellee's way, the appellee would make it appellant's way, or any way he wanted it. The appellant replied he had countermanded his order and would have no more to do with it. On the 25th July, the appellee's secretary wrote the appellant that he still had five days time in which to complete his contract with the appellee, and that the appellee was prepared to fill their part of the contract as called for, and notified him that they had the goods as called for on hand, and had had them since the 1st July, 1879. To this the appellant replied, by repeating substantially what he had

CONTRACTS.—*Continued.*

before said. In an action brought by the appellee on the 9th August, 1879, to recover damages from the appellant, in consequence of his failure and refusal to comply with the contract, it was HELD :

That the appellee could maintain the action, and that the measure of damages was the difference between the cost of manufacturing the article according to the contract, and the price the appellant agreed by that contract to give for it. *Eckenrode vs. The Chemical Co.*, 51.

2. Evidence offered by the appellee as to what the appellant said to the appellee's secretary on the 1st July was admissible, as tending to show that the appellant was then unwilling to comply with his contract, and to explain his reason therefor, and his subsequent countermanding of the order and repudiation of the contract; and it was competent for the appellee to prove that after the 1st July, the appellant never went to appellee's office or manufactory to superintend the making of the phosphate. *Id.*
3. Evidence offered by the appellant to show what was the understanding between the appellee's agent and the appellant at the time the contract was made, in reference to the appellant's superintending the manufacture of the phosphate, and for what purpose and with what intent the clause as to such superintendence was inserted in the contract, was inadmissible. *Id.*
4. The letter written on the 25th July, by the appellee's secretary to the appellant, produced by the appellant upon notice, was admissible in evidence. *Id.*
5. The appellant offered to prove by L. that in September, 1879, he applied to the appellee to buy a quantity of S. C. bone, and was told by the appellee that they had none on hand. On objection, it was HELD :  
That the evidence offered was irrelevant and inadmissible *Id.*
6. The appellant, on cross-examination of a witness for the appellee, asked him: what was the lowest price at which plaintiff sold any ton of phosphate manufactured by plaintiff during July, 1879? On objection, it was HELD :  
That the question should not be asked or answered. *Id.*
7. Where an offer is made generally of a mass of testimony complex in its character, and the whole of it is objected to, it is error to exclude the whole if any part of it is admissible; but in such case it must appear that some part of the testimony offered is clearly admissible. *Id.*

**CONTRACTS.—Continued.**

8. A valid contract binding upon a corporation may be made by an agent not appointed as prescribed by the Act of 1868, ch. 471, as not only the appointment but the authority of the agent may be implied from the adoption or recognition of his acts by the corporation or its directors. *Id.*

*See* ACCEPTANCE OF DRAFT.

ACTS OF ASSEMBLY, CONSTRUCTION OF, 4.

INSOLVENT LAWS, 1.

PRACTICE IN EQUITY, 1.

**CONTRIBUTION.**

*See* MORTGAGES, 6.

**CONVEYANCES.**

*See* DEEDS.

**CORPORATIONS.**

1. In proceedings in equity by shareholders of the stock of a corporation, for the purpose of obtaining redress for what was alleged in the bill, to have been their loss in the value of their shares of stock, by reason of certain wilful and fraudulent mismanagement of the affairs of the corporation by some of its directors, (against whom and the corporation itself, and another corporation, of which they were also directors, and in whose interest it was alleged, they had so acted, the bill was filed)—to accomplish objects and purposes adverse to the interest of the stockholders of the corporation first mentioned, it was HELD :

That to render the directors personally liable for alleged injuries occasioned by conduct wilfully fraudulent, in intent and purpose, amounting to breaches of trust, the proof in support of the allegations must be other than mere constructive fraud or breaches of trust; that there must be affirmative proof of the misconduct charged, going to establish the fraud in fact. *Booth, et al. vs. Robinson, et al.*, 419.

2. In equity, directors of a corporation are personally liable for the consequences of frauds or malfeasance they may be guilty of, or for such gross negligence as may amount to a breach of trust, to the damage of the corporation or its stockholders; but they are not liable for the consequences of unwise or indiscreet management, if their conduct is entirely due to mere default or mistakes of judgment. And the *onus* of proof of fraud, combination or gross negligence, to render directors personally liable, is upon the party

CORPORATIONS.—*Continued.*

- making the charges; which must be distinctly made and fully supported by proof. *Ib.*
3. There is no legal presumption of illegality or unfairness, in transactions between two corporations, from the mere fact, that a portion of the board of directors in the one company constitute a part of the board of directors in the other at the same time, and participated in the dealings between the two corporations. It is only when their dealings are shown to be prejudicial to the one or other of the corporations represented by them, that their conduct will be subject to a strict and severe scrutiny by the Courts. *Ib.*
4. The corporation is the proper and primary party to call the directors to an account in a Court of equity for fraud or breaches of trust in the management of its affairs. To enable a shareholder, either for himself alone, or for himself and others, to maintain a bill against directors for such fraud or breaches of trust, he must allege and show not only the violations of duty or breaches of trust on the part of the directors, but that he as stockholder has been damaged thereby, and that the corporation has failed or refused to take the proper legal steps for the redress of the wrong. But if on a bill filed by stockholders, the proof should sustain its allegations, that a majority of the shares of the corporation are owned by another alleged rival company, and that a majority of the directors of the alleged fraudulently managed corporation are adverse to the interest of the complainants, and are combined against them, and would by means of the control that they exercise, frustrate and defeat any attempt to induce the corporation to take action for the redress of the wrongs alleged; such facts would be a sufficient excuse for not making or alleging a formal demand upon the corporation to take action, especially where the rival company and the alleged fraudulently managed corporation are both made defendants. *Ib.*
5. A corporation may invest in the stock of other corporations as well as in any other funds, provided it be done *bona fide* and with no sinister or unlawful purpose, and there be nothing in its charter or in the nature of its business that forbids it. *Ib.*
6. Corporations, like individuals, may borrow money for the conduct of their affairs, without express authority therefor, whenever the nature of their business may render it proper or expedient. And the power to borrow carries with it very generally, unless expressly restrained, the power to

**CORPORATIONS.—Continued.**

secure the loan by mortgage. If there is no such express power found in the charter of a corporation, but power is conferred on its directors to make all necessary contracts, and to sell or otherwise dispose of any portion of its property whenever in their judgment, it should be found to be to the interest of the company, the exercise of the power to borrow and to secure the loan by mortgage from the company would be valid. *Ib.*

*See* ACTS OF ASSEMBLY, CONSTRUCTION OF, 1, 2, 3, 4.

CONTRACTS, 8.

EQUITY.

SUBSCRIPTION TO STOCK.

**COSTS.**

*See* CODE, CONSTRUCTION OF THE, 1.

PRACTICE IN COURT OF APPEALS, 4.

PRACTICE IN EQUITY, 2, 3.

**COUNTY SCHOOLS.**

*See* ACTS OF ASSEMBLY, CONSTRUCTION OF, 3.

**COUPONS.**

*See* MARSHALLING OF SECURITIES.

**CREDITORS.**

*See* DISTRIBUTION UNDER DEED OF TRUST, 2.

EQUITY.

TRUSTS, 1, 3.

**CRIMES.**

*See* FORGERY.

INDICTMENTS.

PRACTICE IN CRIMINAL CASES.

**DAMAGES.**

*See* CONTRACTS, 1.

DISTRESS, 5.

TRESPASS, 2.

**DATES.**

*See* MECHANICS' LIEN, 1.

**DECLARATION.**

*See* EXECUTOR'S BOND, 2,

**DEEDS.**

By deed of the 15th of May, 1869, E. H., Jr., in consideration of the sum of five dollars "doth grant and assign unto A. during her natural life" certain leasehold and other prop-

**DEEDS.**—*Continued.*

erty, and "also all his interest in the estate of Mrs. G. H. who holds during her life, and after her death it becomes the absolute estate of the heirs-at-law, the said E. H. Jr. will be entitled to one-third interest in said estate;" *habendum*, "unto the said A. during her natural life, and from and immediately after her death to have and to hold all of said property and estate before mentioned, unto the children begotten of the bodies of said E. H., Jr. and A., their heirs, personal representatives and assigns absolutely, share and share alike, as tenants in common, subject, nevertheless, to the life estate of the said E. H. Jr., in all of said property." Then followed covenants against incumbrances, and for further assurance. At the time of the execution of this deed, E. H. Jr., and A. were living together as man and wife and had three children, and subsequently married. E. H. Jr., had purchased from two of the seven devisees under the will of E. H. Sr., their father, their interest in property held by Mrs. G. H., their mother, for life under the will, which, upon her death, the will directed should be sold, and the proceeds divided among the seven children. In a proceeding by parties in interest by petition under Art. 16, sec. 66, of the Code, praying for the appointment of a trustee to sell the property of E. H. Sr., as directed by his will, and for the distribution of the proceeds among the parties entitled, it was **HELD**:

- 1st. That the deed embraced E. H., Jr.'s interest in the property in which his mother Mrs. G. H. had a life estate; and that the deed gave a life estate to A. in the property granted and assigned, and after her death an absolute estate in remainder to the children, subject to the life estate of their father, in case he should survive their mother, and that two-sevenths of the proceeds from the sale should be so applied.
- 2nd. That the deed was valid, there being no proof that E. H., Jr. was at the time of its execution in such a state of drunkenness, as alleged by him, as not to know what he was doing, or the consequences of his own acts; and that there was no proof that it was procured by fraud, misrepresentation and undue influence; and that the fact that he was living with A., as his wife, at the time of its execution, did not raise the presumption of fraud and undue influence on the part of A.
- 3rd. That, though the deed was not in precise conformity with what it appeared. E. H., Jr.'s instructions were, yet

**DEEDS.—Continued.**

no such mistake was made out by proof as would enable a Court of equity to grant relief to E. H., Jr., on that ground; and that even were he entitled to relief, he had lost the right to it by *laches*, ten years having elapsed after the execution and recording of the deed, before E. H. Jr., took steps in the matter.

- 4th. That the deed being filed in the cause as an exhibit with the petition, it was not necessary that A. and the children (minors) should have presented their claim by next friends, the Court being required by the Code to see that the proceeds of sale were applied to the parties entitled. *Hewitt's Appeal*, 509.

*See* DISTRIBUTION UNDER DEED OF TRUST, 1.

EJECTMENT, 1.

EVIDENCE, 5.

HUSBAND AND WIFE, 2, 4.

MARRIAGE.

MORTGAGES.

POWERS.

TRUSTS, 2, 3.

**DEFAULT.**

*See* MORTGAGES, 3.

**DEFAULTERS.**

*See* PRACTICE IN CRIMINAL CASES, 6, 7, 8.

**DEMURRER.**

*See* EXECUTOR'S BOND.

INDICTMENTS, 2, 3.

PRACTICE IN CRIMINAL CASES, 1, 8.

**DIRECTORS.**

*See* CORPORATIONS.

**DISBURSEMENTS.**

*See* PRACTICE IN EQUITY, 4.

**DISTRESS.**

1. A tenant's property was distrained on by Mrs. L., for rent in arrear due her. The tenant had previously agreed in writing to surrender his lease to Mrs. L.'s husband in his own right. He acted as her agent to collect her rents. There was no proof that Mrs. L. authorized or ratified the agreement or a suspension of her right of distress. In an action against Mrs. L. and her husband to recover damages for an alleged illegal distress it was **Held**:

That the tenant could not recover. *Cahill vs. Lee*, 319.



DISTRESS.—*Continued.*

2. The phrase in Stat. 2 W. & M., ch. 5. of two "sworn appraisers," means that two indifferent persons shall be sworn to appraise the goods distrained according to the best of their understandings; they must be persons who are reasonably competent, but they need not be professional appraisers. An auctioneer and the watchman left in charge of lumber distrained in a lumber yard may appraise it. *Ib.*
3. Notice of distress and sale posted up on the premises, the lot leased being used by the tenant as a lumber yard, and also advertised once in a daily newspaper, conforms to the requirements of Stat. 2 W. & M., ch. 5. *Ib.*
4. An action will lie against a landlord upon the equity of Stat. 2 W. & M., ch. 5, for improper management of property taken under a distress for rent, and an improper offering of it for sale, so that it did not sell for the "best price" within the meaning of the provision of the statute, making it lawful for the landlord to sell. What will constitute such mismanagement as will make the distrainer liable, must depend upon the circumstances of each case, and the character of the property seized and sold. *Ib.*
5. The jury should be allowed to consider, in an action for damages against a landlord for an alleged illegal distress, evidence produced as to whether lumber taken under the distress, was properly lotted and exhibited for sale, and whether in consequence of mismanagement in this respect, it sold for less than it otherwise would. In such a case, if the jury found for the plaintiff, the measure of damages would be the fair market value of the lumber at the time and in the condition it was, when seized, less the amount of rent discharged by the proceeds of the sales of it actually made. *Ib.*

## DISTRIBUTION.

*See* JUDGMENTS.

ORPHANS' COURT, 4, 5.

## DISTRIBUTION UNDER DEED OF TRUST.

1. Where debts of a grantor of land conveyed by deed in trust to secure certain notes therein mentioned, did not arise till long after the period (from the execution of the deed till its registration) in which the class of claims designated by this Court, as entitled to distribution under the deed, should accrue, they should be excluded from distributive shares of the proceeds. *Dodge, et al. vs. Stanhope & McLaughlin. et al.*, 113.

DISTRIBUTION UNDER DEED OF TRUST.—*Continued.*

2. The prosecution of claims to judgment, cannot diminish the rights of a creditor in a Court of Equity who applies for a distributive share of the proceeds from the debtor's property sold under a deed in trust. *Id.*

## DOWER.

*See* HUSBAND AND WIFE, 1, 2.

## DRAFT.

*See* ACCEPTANCE.

## EJECTMENT.

1. In the chain of title produced by the plaintiff in an action of ejectment for the recovery of a lot of ground on Lee Street in the City of Baltimore, there was a deed from K. to A. and D., trustees, dated the 29th November, 1841; which deed contained no description of the lot sued for in the body or granting part of it, but referred to a schedule annexed, for specification and description of the property conveyed. The description in the schedule, which was supposed to embrace the lot sued for, was as follows: Five building lots on Lee near Cove Street, 102 feet, @ \$1.25 per foot. It also appeared from this deed that the property embraced by the description just recited, had been conveyed subject to a mortgage from K. to the F. and P. Bank. In the margin of the schedule annexed to the deed of trust, there was a reference to this mortgage as containing a full description of certain property, including the five building lots. The deed of trust to A. and D. contained a power of sale, and it was under and through these trustees by virtue of this power, that the plaintiff claimed title to the lot sued for. Neither the mortgage nor any release thereof was offered in evidence. On exceptions by the defendants, it was HELD:

1st. That the deed from K. to A. and D., trustees, contained no sufficient description of the property to pass the title thereto; and that if the plaintiff had intended to rely upon the description of the property contained in the mortgage, in aid and support of the deed, the mortgage should have been offered in evidence with the deed.

2nd. That there was no sufficient evidence to show legal title to the property in the plaintiff, as even if the deed from K. had been admitted, and had contained a sufficient description of the property, a release or an assign-

EJECTMENT.—*Continued.*

ment of the mortgage should have been given in evidence, or evidence given of the payment or extinguishment of the mortgage debt. *Berry vs. Derwart and Wife*, 66.

2. An action in ejectment was brought the 5th March, 1879, by the appellee against the appellants for certain lots of land described in the declaration, situate in Baltimore County, unoccupied, unimproved and vacant. To the declaration was attached a notice, signed by the plaintiff's attorney, addressed to the defendants, giving them notice of the suit, and requiring them to appear in Court in person or by attorney on the second Monday of March, 1879, to make defence to the action according to law, "otherwise judgment will be recovered against you for the premises described in the declaration, and you will be turned out of possession." All the defendants resided in the City of Baltimore. Three copies of the declaration and of this notice, one for each of the defendants, were issued by the clerk under seal, and placed in the hands of the sheriff of Baltimore County, who made return thereto: "Not found, no tenant in possession, copies set up on the premises." On the 15th September, 1879, at the following September term of the Court, none of the defendants having appeared, the Court rendered this judgment in the case: "Judgment for the plaintiff by default for property described in *narr.* one cent damages and costs." On the 19th September, the defendants appeared by counsel, and moved to strike out the judgment, alleging, they had received no notice whatever of the suit until they saw by the newspapers a day or two before, that the judgment had been recovered against them, and assigning among others as a reason that it should be struck out, that it was irregularly obtained and was contrary to law. **Held:**

That, under the Act of 1872, ch. 346, the judgment was entered without authority and should be struck out. *MacKenzie, et al. vs. Renshaw*, 291.

## EMPLOYÉS.

*See* ACTS OF ASSEMBLY, CONSTRUCTION OF, 1, 2.

## EQUITY.

Where one creditor cannot be injured by the dissolution of an injunction granted on the filing of a bill by creditors against a corporation, and its continuance would defeat the plans for the re-organization of the corporation entered into by the creditors, and would be inconsistent with previous

EQUITY.—*Continued.*

orders in the cause, there is no equity that would justify the Court in maintaining the injunction at the sole instance of one creditor as against all the other creditors, as well as the corporation. *Washington City and Pt. Lookout R. R. Co. vs. The South. Md. R. R. Co., et al.*, 153.

*See* ASSIGNEES' EQUITIES.

DISTRIBUTION UNDER DEED OF TRUST, 2.

MARRIAGE, 1.

ORPHANS' COURT, 7.

PRACTICE IN EQUITY.

## ESTOPPEL.

*See* ACTS OF ASSEMBLY, CONSTRUCTION OF, 3.

HUSBAND AND WIFE, 1.

## EVIDENCE.

1. The State, in a trial of M. for murder, proved by K., that W., the alleged deceased, left K's house where W. was making his home, on Tuesday morning, August 5th, 1879, and proceeded up the public road towards Emmitsburg; that on the Sunday following W. not having made his appearance, K. went to the house of R., where M. was then staying, and inquired of M. whether he had seen anything of W.; that M. said he saw him on Tuesday, talked with him on the hill, when he left, saying he was going to Tom Shorb's and from there to town, and that he, M., then went to Motter's Station; that on Tuesday, the 12th, W's body was found buried in Myers' woods, with a wound in the back of the neck, two holes close together, as though both barrels of a gun had been fired at once into the neck, and the face was torn away; that about sixteen feet from the grave was a small ravine, which presented marks and the appearance of having been first used for the burial of the body; that there were leaves in it, and leaves had been raked out. The State then proved by S. that on the afternoon of August 4th, he saw M. in Knode's woods sitting near the road; that he went to him and talked with him, and he asked S. if S. had seen anything of W. S. replied no, and said, why don't you go to the house; to which M. replied, I am not going there, Sarah, (meaning K's wife, and W's sister,) makes such a fuss; she knows my business better than I do; that a short time afterwards M. met S. near the barn on Kane's place, and asked S. if he was going to Zacharia's, and they then went together as far as Tom's creek; on the way they had some talk about the gun M.

EVIDENCE.—*Continued.*

was carrying; M. shot a squirrel with the left hand barrel of the gun, reloaded it and remarked, that he kept the right hand barrel for long range, it shot better. Upon cross-examination, S. was asked whether on Monday, the 11th, before W's body was found, he had in a conversation with one G., in the public road, near the house of J. McC., told G. that W. had been murdered and buried under leaves in Myers' woods, and that his head had been mashed in. The State objected and the Court below refused to allow the question to be answered. On exceptions by M., it was HELD:

That the objection was properly sustained. *Munshower vs. The State*, 11.

2. The State offered in evidence "Gruber's Almanac for 1879," for the purpose of proving at what hour the moon rose on the night of Saturday, August 9th, 1879, but M. objected to the admissibility of the almanac for said purpose. The Court below overruled the objection, and allowed the almanac to be offered in evidence. On exceptions by M., it was HELD:

That the evidence was admissible. *Id.*

3. The State proved by F. that he was a witness at the coroner's inquest on August 13th, 1879; that, after all the witnesses had testified, M. was brought in and was told that if he desired it he could have the witnesses re-called; that the testimony of those who had been sworn was read over to M., and that, when that of F. was read over, to the effect that he had seen M. at Motter's Station on August 5th, between 10.30 and 11 A. M., M. turned to F. and said, I think you are mistaken about that, I was at the station about 9 o'clock that morning, and if you consult Mr. N., you will find that I am right, and I can prove that by H. R. and S. D. The State also proved by other witnesses, declarations of M. that he had arrived at Motter's Station at 9 A. M., on August 5th. M. then called H. R., and asked him whether he had been a witness on the inquest, to which he replied yes, and then further asked him whether he had not testified, on that occasion, that he saw M. at Motter's Station on the morning of August 5th, about 9 o'clock, offering to show that H. R. had, previously to the statements and declarations by M., told a brother-in-law of M. that he had seen M. at said station at that hour, which was mentioned to M. by the brother-in-law; that this offer was made to show that the statement made by M. to F. was based upon the statement of H. R., and that H. R. was, in point of fact, mistaken about the time; the object being to rebut the

EVIDENCE.—*Continued.*

charge that M. had attempted to set up an *alibi*, and to show that his mistake was the result of the error of H. R. The State objected, and the Court below refused to allow the question to be asked and answered, and the evidence to be offered. On exceptions by M., it was HELD :

That the objection was properly sustained. *Ib.*

4. A defendant in equity is incompetent to testify as to transactions between the complainant's intestate and himself; and objection to his testimony is not waived by his cross-examination before the auditor, as such objections may always be taken at the hearing in equity. *Dodge, et al. vs. Stanhope & McLaughlin, et al.*, 113.
5. Declarations of a grantor in a deed or bill of sale impairing the rights of those claiming under the instrument, made subsequent to its execution, by which declarations, claims barred by the Statute of Limitations would be revived, are inadmissible against the grantee and those claiming under it. *Ib.*
6. Testimony of a witness taken by the auditor without authority of Court, after the account which it concerned, had been filed, is inadmissible. *Ib.*
7. In an action on a joint and several promissory note against one of two makers, to which he pleaded payment and limitations, evidence was admissible of payment of items of interest and of part of the principal by the co-maker, who was dead when the suit was brought, endorsed on the note in his hand-writing, and of admissions by the maker sued, to take the note out of the operation of the Statute of Limitations, and show that it was the latter's debt. *Burgoon vs. Bixler*, 384.

*See* ACCEPTANCE.

## ACKNOWLEDGMENT.

CONTRACTS, 2-7.

CORPORATIONS, 1, 4.

DISTRESS, 5.

EJECTMENT, 1,

EXECUTOR'S BOND, 2.

FORGERY, 3.

INSURANCE, 3.

MARRIAGE, 1, 4.

MECHANICS' LIEN, 4.

MORTGAGES, 5.

PRACTICE IN THE COURT OF APPEALS, 1.

PRACTICE IN CRIMINAL CASES, 4, 6, 7, 11, 12, 13.

WILLS, 3.

## EXCEPTIONS.

*See PRACTICE IN THE COURT OF APPEALS, 1, 2, 3.*

*PRACTICE IN CRIMINAL CASES, 3, 4, 9.*

## EXECUTOR'S BOND.

1. Suit was brought on the bond of C., as executor of H., to recover an amount claimed to be due the equitable plaintiff as legatee under H's will. Shortly after suit brought, C. was adjudged a bankrupt, and among other claims proved against the estate was that sued on. Subsequently the Court below directed a stay as against C. pending the proceedings in bankruptcy. The suit was entered to the use of M. E. H., and judgment recovered against the sureties on the bond. The amount recovered was paid by W., one of the sureties, and the equitable plaintiff's assignee assigned the judgment and cause of action to W. On motion of the plaintiff the suit was brought forward and the stay as to C. stricken out. Pleas were filed by C., to some of which the plaintiff demurred, and upon others issues were joined. **Held:**
  - 1st. That C's discharge in bankruptcy did not release him from liability for the debt due by him as executor to the equitable plaintiff as legatee.
  - 2nd. That neither at common law nor under Art. 9 of the Code, could W. maintain an action on the bond against C. to recover the money paid by him, as the payment operated at law as an extinguishment of the bond; that his remedy at law was an action of *indebitatus assumpsit* against B. for money paid to his use.
  - 3rd. That in equity the payment by W. did not operate as a satisfaction or extinguishment of the bond, and that by such payment W. was entitled in equity to be subrogated to all the rights and remedies and securities which the plaintiff as creditor held against C. *Crisfield vs. The State, use of Handy, et al., 192.*
2. The *narr.* in a suit by a legatee on an executors' bond against the executors and sureties, set out the bond, its approval by the Orphans' Court, and that the executors undertook and assumed the office of executors of J. H. W., deceased, and alleged that the executors had not faithfully performed their duties without injury to persons interested, and assigned as breach "that large amounts of money came into their hands as executors, which were properly due and payable by them to E. A. V., (the legatee,) as and for her share of the estate of her father, the said J. H. W., deceased, yet the executors failed and neglected to pay over to her a large amount of said money, to wit: the sum of \$652; although such pro-

**EXECUTOR'S BOND.—Continued.**

ceedings were had in the Orphans' Court of Baltimore County, that on the 23rd January, 1878, an order was passed by said Orphans' Court, whereby the said executors were expressly ordered to pay over to the said E. A. V., the said sum of \$652, in full of her share of the said estate." It further alleged notice to the executors, demand and non-payment, and consequent liability of the defendants. To this *narr.* the appellants demurred. **HELD:**

1st. That the demurrer should be overruled.

2nd. That the will of J. H. W. was properly admitted as evidence in support of E. A. V's right of action.

3rd. That a record of the proceedings in the Orphans' Court showing the indebtedness of the executors to E. A. V., and containing the order of that Court directing its payment, was admissible in evidence.

4th. That a prayer of the defendants, that the administration accounts of the executors, wherein they craved allowance for \$205.69, to have been paid E. A. V. in full of her share of the estate, be declared conclusive, and that the plaintiff could not recover, was properly rejected. *Ruby and Longnecker vs. The State, use of Verney*, 484.

**FEEES.**

*See* PRACTICE IN EQUITY, 3, 7.

**FIDUCIARY DEBTS.**

*See* EXECUTOR'S BOND, 1.

**FINES.**

*See* ACTS OF ASSEMBLY, CONSTRUCTION OF, 5.

**FIRE INSURANCE.**

*See* INSURANCE, 4.

**FORGERY.**

1. A certificate of indebtedness issued by the Mayor and City Council of Baltimore, known as City Stock, is a bond within the meaning of sec. 24 of Art. 30 of the Code, relating to forgeries. *Bishop and Helm vs. The State*, 138.
2. An endorsement of such a certificate with fraudulent intent, may be a forgery within the meaning of the statute, though the certificate is upon its face transferable only at the Mayor's office in person or by attorney. This provision is for the protection of the corporation. *Id.*
3. Where the appellants were indicted not only for forging the endorsement of K. on the bond set out in the indictment, but



**FORGERY.—Continued.**

also for uttering the same knowing it to be forged, to prove guilty knowledge it was competent for the State to show that on or about the time of the forgery charged in the indictment, the appellants held and uttered similar forged instruments. *Ib.*

**FRAUD.**

*See* CORPORATIONS.

DEEDS.

**GRAND JURY.**

*See* PRACTICE IN CRIMINAL CASES, 2.

**GRUBER'S ALMANAC.**

*See* EVIDENCE, 2.

**HUSBAND AND WIFE.**

1. The interest of the wife in her husband's real estate is inchoate only during his life. It requires the husband's death to occur before it becomes a vested right. The wife's inchoate right is not such a right as may be bargained and sold. Her deed does not pass any title. It operates only by way of estoppel or release, and any words of release would be as effectual as words of grant. She cannot convey it to a stranger. It is only released to the owner of the fee. There is no scale or standard for ascertaining the present worth of a wife's inchoate right of dower. *Reiff vs. Horst, et al.*, 42.
2. A deed from H. in which his wife united, conveyed all his property to trustees for the benefit of his creditors. The deed provided for the payment to the wife, in consideration of her uniting in the deed, of one-twelfth of the gross proceeds of the sale of the real estate thereby conveyed in trust, in lieu of her contingent right of dower therein. The wife had previously united with H. in several mortgages of his real estate, one of them being to the same parties afterwards trustees in the deed of trust; there was, however, one piece of land not mortgaged which passed by the deed of trust. The grantees in the deed sold the property as therein provided. In the distribution of the proceeds of the real estate, it was HELD:
  - 1st. That though the wife could not bind H's creditors (except such as were parties to the agreement,) to pay her from his estate, for her contingent right of dower, just such sum as she might have stipulated with H. and his trustees should be paid for uniting in the

HUSBAND AND WIFE.—*Continued.*

deed, and which was accordingly reserved therein; nevertheless, considering that the wife had barred herself in the larger part of the estate by uniting in the mortgages, and had united in the deed of trust, in the expectation of receiving an allowance from the whole estate, it was equitable she should receive the twelfth part of the proceeds of sale of the piece of land not mortgaged, after paying its proportion of the costs of the case, as an allowance to her for her release of expectant right of dower in that parcel.

2nd. That the wife should also be allowed the twelfth part of the sum awarded to the mortgage of the trustees, they being bound by the agreement contained in the deed of trust. *Id.*

3. To the possession of land given to a wife by her father in 1840, the husband having children by the wife, became entitled *jure uxoris*, and to the pernaney of profits during their joint lives, and as tenant by the curtesy upon her death, if he should survive her; and this title was not divested by the Act of 1841, ch. 161, or by the provisions of the Code of 1860. During the continuance of his life estate, he alone is entitled to sue for an injury to the possession or profits of the land; for an injury to the inheritance the suit must be in the joint names of himself and wife. *Porter vs. Bowers*, 214.

4. In 1866, real estate belonging to H., was sold to H's wife by the sheriff under a *fi. fa.* issued on a judgment against H. and a deed duly executed by the sheriff to H's wife. Afterwards, H. mortgaged the same property to C., trustee for H's wife, to secure to her money derived from her father's estate and borrowed by H. In 1875, C., as trustee for H's wife, and H. conveyed as grantors, the same property by way of mortgage to a building association to secure payment of money loaned to H's wife. This instrument containing the usual mortgage conditions and covenants on the part of H's wife, was signed, sealed and acknowledged by C., H's wife and H. and duly sworn to and recorded. In proceedings by the building association to sell the property described in the alleged mortgage, it was HELD:

That this instrument constituted in equity a charge upon H's wife's estate; and that the building association was entitled to enforce the mortgage against the property. *Frostburg Perp. Build. Assoc. vs. Hamill*, 318.

HUSBAND AND WIFE.—*Continued.**See* DEEDS.

DISTRESS, 1.

INSOLVENT LAWS, 1.

MARRIAGE.

ORPHANS' COURT, 7.

PRACTICE IN CRIMINAL CASES, 18.

## IMPROVEMENTS.

*See* ORPHANS' COURT, 7.

## INDEBITATUS ASSUMPSIT.

*See* EXECUTOR'S BOND, 1.

## INDICTMENTS.

1. The quashing by the Court below of an indictment on the motion of the defendant being a final termination of the prosecution upon the particular indictment, the defendant was discharged from all further proceeding thereon, and a motion by the defendant in error in this Court to dismiss the assignment of errors must be overruled. *State vs. Wade*, 39.
2. Where a motion is made to quash an indictment for certain supposed defects or legal insufficiencies apparent upon its face, and which would, if the objections taken be well founded, be the proper subject of demurrer under Art. 30, sec. 82, of the Code, such motion should not be entertained by the Court below. *Id.*
3. A writ of error lies on a judgment quashing an indictment on demurrer, such judgment being a final judgment. *State vs. Hodges*, 127.
4. The offence of receiving stolen goods is in this State, a misdemeanor. In such a case, it is not necessary to allege in the indictment that the property in question was feloniously received; nor need such indictment charge that the traverser received the stolen goods for the purpose of converting them to his own use. *Id.*
5. It is not necessary that the receiving should be *lucri causa*. If one receives stolen goods knowing them to be stolen, for the mere purpose of concealment without deriving any profit at all, or merely to assist or aid the thief, such a receiving is within the statute. *Id.*
6. But an indictment for receiving stolen goods, a common law offence, should charge that the same were unlawfully received. *Id.*
7. Where one is charged with a common law offence, the mere averment that it was done *contra pacem* does not dispense

INDICTMENTS.—*Continued.*

with the necessity of setting out in proper terms, the circumstances necessary to constitute the alleged common law offence. *Ib.*

8. In this State the Code merely prescribes the punishment for receiving stolen goods, and does not in any manner change the nature or character of the offence itself. *Ib.*

*See* FORGERY.

PRACTICE IN CRIMINAL CASES.

## INEBRIETY.

*See* DEEDS.

## INFLUENCE, UNDUE.

*See* DEEDS.

## INJUNCTIONS.

*See* ACKNOWLEDGMENT.

ACTS OF ASSEMBLY, CONSTRUCTION OF, 3, 4.

EQUITY.

MORTGAGES, 4.

ORPHANS' COURT, 7.

PRACTICE IN EQUITY, 1.

## INSPECTION LAWS.

*See* ACTS OF ASSEMBLY, CONSTRUCTION OF, 5.

## INSOLVENT LAWS.

1. The insolvent law of this State contained in Art. 48 of the Code, and in previous Acts, does not embrace the case of a married woman as an insolvent debtor; nor do the Acts subsequent to the Code, making special provision for enabling married women to contract, and for recoveries against them at law, extend the provisions, or affect the construction of the insolvent law in the Code. *Relief Build. Association vs. Schmidt and Husband*, 97.
2. In an action of *assumpsit* for goods bargained and sold, the defendant pleaded his discharge under the Insolvent Laws. To this plea, the plaintiff filed a replication of *nul tiel record*.  
HELD:

That the issue upon the replication was one solely for the determination of the Court, and if the Court found upon an inspection of the record of proceedings in insolvency, that the defendant had been discharged under the Insolvent Laws, judgment should be entered for the defendant, without qualification; and that the plea of discharge in insolvency being a bar to the action, the

INSOLVENT LAWS.—*Continued.*

right and remedy of the creditor would be against the trustee in the Insolvent Court. *Becker vs. Whitehill*, 572.

3. In providing that judgment creditors may take in execution property of the insolvent not mentioned in the schedule, and thereby acquire priority in the proceeds of such property, the Code, Art. 48, means creditors who have obtained judgments against the insolvent, prior to the filing of his petition, because under the plea of discharge in insolvency, no judgment can be recovered against him. *Id.*

*See* EXECUTOR'S BOND, 1.

JUDGMENTS.

## INSTRUCTIONS.

*See* DEEDS.

PRAYERS.

## INSURANCE.

1. A non-forfeitable policy of life insurance issued by the appellant to the appellee in the amount of \$2000, for the term of the life of the assured, among other conditions contained the following: "If the said premiums shall not be paid on or before the days above mentioned for the payment thereof, at the office of the company in the City of Baltimore, (unless otherwise expressly agreed in writing,) or to agents when they produce receipts signed by the president or secretary, then in every such case, the said company shall not be liable for the payment of the whole sum assured, but only for an amount proportionate to the number of premiums paid."—*Mutual Life Ins. Co. vs. Bratt*, 200.
2. In an action by the appellee to recover the amount of the insurance, among other things, the death of the assured was proved, and that prior to his decease, twenty-seven quarterly premiums had been regularly paid from the date of the policy, and that thereafter default was made, and no other quarterly premiums had been paid; and that four other quarterly premiums had after said default become due, and were unpaid at the decease of the assured. **Held:**  
That the plaintiff was entitled to recover twenty-seven thirty-one parts of \$2000, with interest in the discretion of the Court on the amount so ascertained from the date of the institution of the suit. *Id.*
3. The charter and by-laws of the company and a table referred to in the application for insurance were admissible in evidence in this case, but not the portion of a volume entitled *The Principles and Practice of Life Insurance*, containing

INSURANCE.—*Continued.*

rules and modes of calculating and adjusting life insurances; nor the opinions of experts. *Ib.*

4. The appellant by its agent S. underwrote for B. a policy insuring against fire certain buildings and property in Cumberland, to the amount of \$2500. The property being destroyed by fire the appellant refused to pay the insurance, alleging non-compliance by the assured with the following condition of the policy: "If the interest of the assured in the property be any other than the entire, unconditional and sole ownership of the property, for the use and benefit of the assured, or if the building insured stands on leased ground, it must be so represented to the company, and so expressed in the written part of the policy, otherwise the policy shall be void." The following condition was also in the policy. "If the interest of the assured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee or otherwise, be not truly stated in the policy, then and in every such case the policy shall be void." The property was insured as K's property; but before the time the policy was written, B. having borrowed \$6000 from H., had, instead of a mortgage, created a ground rent in his favor of \$420 *per annum*, redeemable on payment of the sum advanced, being in effect a lease for ninety-nine years. This fact was not written on the policy. B. sued at law; and the Court having decided, that he could not maintain his action on the policy unless H's interest was described in it, he dismissed his suit at law and filed a bill in equity to reform the policy, on the ground that the statement of the existence of an incumbrance on the property and the real interest of the parties intended to be insured was omitted by the inadvertence and mistake of S., agent of the appellant, and of J., B's agent, to whom, the bill alleged, the nature of H's interest was known. In their testimony S. and J. both denied all knowledge of H's interest. **HELD:**

That the relief prayed could not be granted. *Farmville Ins. and Bank. Co. vs. Butler, use of Hoffman*, 233.

*See* TAXATION, 3.

## INTEREST.

*See* EVIDENCE, 7,

SUBSCRIPTION TO STOCK.

## ISSUES.

*See* ORPHANS' COURT, 6.

## JUDGMENTS.

The appellee on the 3rd October, 1874, leased certain lots of ground in Baltimore to J., he contemplating the borrowing of money from the appellee to erect houses on the ground, and in pursuance of an agreement whereby the appellee was to advance from time to time money to him for the erection of the houses, J. did, at the time of accepting the lease, confess a judgment in favor of the appellee for \$4500 on terms, whereby the same was to be held as security for the re-payment of all moneys the appellee might advance to J. (not to exceed the amount of the judgment,) between its date and the 1st January, 1876. At the same time J. mortgaged the ground to the appellee to secure the advances mentioned in the terms of the judgment. After the judgment had been entered up and the mortgage made, J. commenced the houses; and after the commencement of the houses the appellee in pursuance of the terms of the judgment, advanced to J. an amount exceeding \$693. The appellants furnished materials for and about the erection of the houses, also for an amount exceeding \$693, for which they filed liens against the property. On the distribution in insolvency of \$693, proceeds from the sale by the trustee of J., an insolvent debtor, of the property leased to him by the appellee, it was HELD :

That the judgment to the appellee had priority over the mechanics' liens filed by the appellants. *Robinson, et al. vs. Consol. Real Estate and Fire Ins. Co.*, 105.

*See* DISTRIBUTION UNDER DEED OF TRUST, 2.

EJECTMENT, 2.

INSOLVENT LAWS, 2, 3.

MARSHALLING OF SECURITIES.

MECHANICS' LIEN, 2.

SUBSCRIPTION TO STOCK.

## JUNIOR INCUMBRANCES.

*See* MORTGAGES, 2, 4.

## JURISDICTION.

*See* ARBITRATION AND AWARD.

ORPHANS' COURT, 2.

MARRIAGE, 1.

TRUSTS, 2.

## JURORS.

*See* PRACTICE IN CRIMINAL CASES, 2, 4, 5, 8, 9, 10.

SUBSCRIPTION TO STOCK.

JUSTICES OF THE PEACE.

*See* ACKNOWLEDGMENT.

LACHES.

*See* DEEDS.

ORPHANS' COURT, 3.

LAND.

*See* ANNUITY.

LAND AND LOAN COMPANIES.

*See* SUBSCRIPTION TO STOCK.

LANDLORD AND TENANT.

*See* DISTRESS.

LAW OF THE CASE.

*See* PRACTICE IN THE COURT OF APPEALS, 3.

LEASES.

*See* DISTRESS, 1.

LEGACIES.

*See* EXECUTOR'S BOND.

WILLS.

LICENSES.

*See* ACTS OF ASSEMBLY, CONSTRUCTION OF, 9.

LIENS.

*See* ANNUITY.

JUDGMENTS.

MARSHALLING OF SECURITIES.

MECHANICS' LIEN.

MORTGAGES.

LIFE INSURANCE.

*See* INSURANCE, 1, 2, 3.

LIMITATIONS.

*See* EVIDENCE, 5, 7.

SUBSCRIPTION TO STOCK.

TAXATION, 2.

MARRIAGE.

1. A Court of Equity is empowered to declare a marriage, procured by abduction, terror, fraud or duress, a nullity, by virtue of its general jurisdiction in matters of fraud affecting contracts. By Art. 60, sec. 8, of the Code, a Court of equity is authorized to declare a marriage null and void, where it is within the prohibited degrees of kindred or affinity, or where there is a first marriage subsisting at the time of the second. In such cases, the parties themselves are made competent witnesses, by the Act of 1864, ch. 109. *Le Brun vs. Le Brun*, 496.



**MARRIAGE.—Continued.**

2. Where a marriage *de facto* is followed by cohabitation and issue, there is not only the ordinary presumption in favor of its validity, but being assailed upon the ground that a former marriage of the woman is still subsisting, the crime of bigamy, on her part is involved in the charge, and the law always presumes against the commission of crime and in favor of innocence. No decree can be passed in such a case, unless the fact that the former husband was alive at the date of the second marriage, is clearly established by such proof as all the authorities, upon the soundest reasons, indicate and require. *Ib.*
3. It would be an alarming doctrine to hold that an actual ceremonial marriage could be made void by the mere confession or declaration of one of the parties to it, that she had another husband living at the time; especially in a case where the fact that the first husband was alive at the date of the ceremonial marriage, if true, could by the use of proper and reasonable diligence be established by direct and conclusive proof. *Ib.*
4. The testimony of a witness on behalf of a second husband, in a proceeding by him to have the ceremonial of marriage with the woman declared a nullity, as to a letter, not produced in evidence and not proven to have been lost or destroyed, or its absence otherwise satisfactorily accounted for, purporting to be from the first husband, received by the witness in answer to one written by him after the second marriage, was properly excluded; as was also a letter purporting to be from the first husband, addressed to his daughter, after the second marriage, the genuineness and authenticity of which letter, and the identity of the person who dictated it with the first husband, (who could not write,) not being established. *Ib.*

*See* DEEDS.

**MARRIED WOMEN.**

*See* DEEDS.

HUSBAND AND WIFE.

INSOLVENT LAWS, 1.

MARRIAGE.

**MARSHALLING OF SECURITIES.**

The Md. F. M. and M. Co., on the 1st July, 1868, executed a mortgage of all its property to B., and others, to secure the payment of \$100,000 of coupon bonds, issued at the same time by the company. On the 1st January, 1870, the company

MARSHALLING OF SECURITIES.—*Continued.*

executed to the same parties another mortgage of the same property, to secure the payment of other \$100,000 of coupon bonds, issued at the same time by the company. On the 30th October, 1872, the company executed to S. and T., a mortgage of the same property, to secure the payment of two promissory notes in favor of K. and C., amounting to \$30,000. On the 28th March, 1873, U. D. obtained judgment against the company for \$1179.07, and issued execution, which was levied on the company's property. D. assigned the judgment on the 26th August, 1873, to H., president of the company. On the 14th October, 1874, B. levied an attachment on the company's property, for \$3687.72. It being discovered in 1874, that the mortgages were defective, in consequence of their not having been acknowledged in accordance with the requirements of the Code, and not having the required affidavit of consideration, nor the corporate seal affixed, on the 12th October, 1874, a resolution of the company, authorized deeds to be executed, confirming what was contained in each of the mortgages, which deeds were accordingly duly executed on the 16th, 19th and 20th October, 1874, respectively, and acknowledged and recorded the first on the 20th, and the other two on the 22nd October, 1874. Default having been made in the payment of the coupons of the first series of bonds, B., trustee, at the request of the holders of some of the said bonds and overdue coupons, filed a bill in equity, on the 4th November, 1874, to obtain a sale of the property of the company, and to determine how the proceeds should be distributed. **HELD:**

That the property should be sold for the payment of the claims against it, in the following order:—

- 1st. The costs of the proceedings and the trustee's commissions.
- 2nd. H. assignee of U. D.'s judgment less \$185.79, part of said judgment; as it appeared, that in 1872 the company executed two notes to W. H. D. one for \$600 and the other for \$347.72 afterwards endorsed to U. D.; that W. H. D. had no notice of the mortgages; that in 1872 U. D. had dealings with the company by which it became indebted to him \$185.79, balance due him on a settlement of accounts on the 1st August 1872, on which causes of action he obtained the judgment for \$1179.07; and as the \$185.79 was a debt incurred by the company after U. D. had heard from common report that the company had issued bonds and executed mortgages to secure

MARSHALLING OF SECURITIES.—*Continued.*

- them, which report was sufficient to put him on enquiry, and notice should be imputed to him.
- 3rd. B's judgment of condemnation, as the debt was contracted before the deeds of 1874 were recorded, and without notice of the defective mortgages.
- 4th. O. having filed in the proceedings second mortgage bonds to the amount of \$5000 with the coupons, and there being no evidence, that he had notice of the first series of bonds or of the defective mortgage to secure them, nor anything appearing on the face of the second series of bonds or their coupons to indicate that a first series had been issued and a mortgage executed to secure their payment, and if it should further appear, that O. purchased the bonds filed by him before the recording of the confirmatory deed, his \$5000 worth of bonds and coupons would be entitled to payment next in order; but if it should appear that they were obtained by him after the confirmatory deed was duly recorded, then their payment should be deferred until the holders of the first series of bonds and their coupons shall have been paid.
- 5th. The bonds secured by the first mortgage and their coupons, whether attached to, or severed from the bonds and transferred and held *bona fide*, should be paid *pari passu*.
- 6th. The bonds secured by the second mortgage with their coupons, whether attached or detached and transferred, the holders having taken them with knowledge of the prior mortgage, should be paid *pari passu*.
- 7th. The notes secured by the third mortgage C. and K., having had knowledge of the bonds and of the two prior mortgages.
- 8th. All other claims against the company payable ratably, including the claim of coupons filed in the proceedings by the receiver of a bank, it appearing that the bank did not purchase the coupons but redeemed them as agent for the company and on its account, the bank being the place where the coupons were payable. *Brown, Trustees vs. Freestone Min. & Man. Co., et al., 547.*

See MORTGAGES, 6.

## MECHANICS' LIEN.

1. Art. 61, sec. 19, of the Code, requires the time when the work is done or materials furnished to be stated in the mechanic's lien filed; but if by accident or mistake, and without fraud,

**MECHANICS' LIEN—Continued.**

- the date is erroneously entered, and the proof establishes the doing of the work or the actual delivery of the materials which are charged, and supplies the correct date, which is within the time allowing the lien to be filed, the error cannot be availed of to defeat recovery. *Treusch vs. Shryock & Clark*, 330.
2. A judgment under a mechanic's lien claim against several houses should be for the specific sum due on each house. *Ib.*
  3. Under Art. 61, secs. 11 and 19, of the Code, it is a fatal defect for lienors not to give notice to the owners or reputed owners of the houses and lots, of their intention to claim a lien. *Wehr, et al. vs. Shryock & Clark*, 334.
  4. Where the lien claim filed (which is the basis of proceedings to recover the amount claimed, whether by *sci. fa.* or bill in equity) required that notice should be given to the owners of the houses and lots, and the bill averred that due notice was given to the owners, no decree could be rightfully passed without proof that the notice was given as alleged. *Ib.*

*See* JUDGMENTS.

**MISREPRESENTATIONS.**

*See* DEEDS.

MORTGAGES, 1.

**MISTAKE.**

*See* DEEDS.

INSURANCE, 4.

**MORTGAGES.**

1. Where it appeared from the testimony taken under exceptions to the ratification of an attorney's sale of mortgaged property under a power contained in the mortgage, that the property, which sold for \$4550, was worth largely over \$6000, and that at least one *bona fide* bidder, willing, able and anxious to buy, and who would have bid a much larger sum than that at which the property sold, was kept away from the sale by the direct agency of the mortgagee's president, and in consequence of representations and an agreement which he made, but which he afterwards failed to carry out, it was HELD:

That the sale should be vacated and a new one made.  
*Loeber and Herring vs. Eckes*, 1.

2. A second mortgage with actual notice of a first mortgage, is not in a position to question the equities of the first mortgage. *Frostburg Perp. Build. Assoc. vs. Hamill*, 313.

MORTGAGES.—*Continued.*

3. K. being in default on a mortgage to a Building Association of which he was a member, on petition of the mortgagee, the Court passed a decree for sale, and appointed a trustee, who gave bond and advertised the property for sale. K. then filed a petition, alleging that he was not in default and praying an injunction to restrain the sale. The injunction was ordered, and the case was sent to the auditor, to state an account of what, if anything, was due the mortgagee. On exceptions by K., it was HELD:

- 1st. That K. being in default, the property was properly advertised for sale, and that the account allowing the trustee one-half commissions under rule of Court, and other costs incurred by the proceedings, was correct; and that an order of Court thereon was properly passed, in so far as it directed the mortgagee, upon payment to it of the sum of money found to be due by the account, to release the mortgage, and allowing to the mortgagee interest to date of payment; provided the payment was made within thirty days, until which time the restraining order was continued.

- 2nd. That the failure by K. to pay taxes was such a default as justified the advertisement of the property for sale.  
*Gustav Adolph Build. Assoc. vs. Kratz*, 394.

4. A. and J. M. had a vendor's lien for unpaid purchase money on land in Baltimore County, sold by them in 1877 to the B. Co., which land the Company held under a bond of conveyance from the M. To enforce their lien the M. in February, 1880, instituted proceedings in equity, making all incumbrancers parties. In December, 1878, R. filed a mechanic's lien against buildings and fixtures on the land. He obtained judgment in February, 1880, on notes, for the amount of his lien in the Baltimore City Court, on which he issued execution, on the 8th July, 1880, to Baltimore County, to obtain a lien on the personal property of the B. Co.; he also instituted proceedings on his mechanic's lien claim to sell the property bound by it. On the 8th March, 1879, the B. Co. executed a mortgage to P. and H. of the land and of its machinery, &c., and personal property. On the 24th March, 1879, the B. Co. executed another mortgage of the land and another of the machinery, &c., and personal property to B. and S., trustees. B. and S., trustees, under the powers in the mortgages to them, advertised all the property of the B. Co. for sale on the 12th July, 1880, free from all incumbrances, and to give possession to purchasers. R. on the same day applied to the

**MORTGAGES.—Continued.**

Circuit Court for Baltimore County, wherein the proceedings of the M. and of R. were pending, for an injunction to restrain B. and S., trustees, from selling, and for the appointment of receivers of the B. Co. The Court, on the bill and exhibits, granted the injunction and appointed receivers.

**HELD:**

That the injunction was properly granted, as to the personal property; and that as to the real estate, B. and S., trustees, should be restricted to selling their equitable interest in the real estate subject to the prior liens; but that the appointment of receivers was premature. *Brick Co., et al. vs. Robinson*, 410.

5. In equity, where it appears that while a transaction was made to assume the form of an absolute bill of sale, it was in substance, and according to the understanding and intent of the parties, a mere loan of money, and that the instrument taken, being an absolute bill of sale, was but as security, and therefore a mortgage, any evidence, whether written or oral, tending to show that the transaction was really one of security is admissible, not for the purpose of contradicting the terms of the instrument, but of raising an equity paramount to the mere form of the instrument. *Booth, et al. vs. Robinson, et al.*, 419.
6. On the 15th December, 1874, C. L. H. and others conveyed to J. F. two leasehold lots in Baltimore City. On the same day J. F. mortgaged both lots to C. L. H. to secure \$2000. On the 28th December, 1874, J. F. sub-leased a part of the second lot to F. B. On the 14th September, 1876, J. F. assigned all his interest in both lots to G., subject to the mortgage for \$2000, and another mortgage of even date given by J. F. to a building association. On the 24th April, 1878, G. mortgaged the first lot to M. G. and L. G. to secure \$1500. On the 5th November, 1878, G. assigned all his interest in both lots to B. F., subject to the mortgage for \$2000. The mortgage to M. G. and L. G. was foreclosed, M. G. became the purchaser at \$1150, and a deed for that lot was executed to him, on the 29th January, 1879, by the trustee who made the sale. At the time of sale, the trustee stated, that the lot was sold subject to the effect and operation of a first mortgage for \$2000. It was afterwards shown that this lot was worth from \$3000 to \$3500. On the 10th February, 1879, C. L. H. assigned his mortgage on both lots and the mortgage note to D. On the 11th February, 1879, B. F. conveyed the second lot to F. B. On the 7th

**MORTGAGES.—Continued.**

March, 1879, D. obtained a decree for the sale of all the mortgaged property described in the mortgage to C. L. H., and a trustee was appointed to make the sale. After the property was advertised, M. G. offered to pay the mortgage debt if D. would assign the mortgage for \$2000 to him. This offer D. and the trustee declined. On the 15th March, 1879, M. G. filed his bill against D., F. B. and the trustee, charging among other things, that he was entitled to an assignment of the mortgage and decree after paying the mortgage debt, and praying that if sold, the lots should be sold in the order designated in his bill, and that the sale of the property of M. G. under D's decree should be enjoined until a sale of the other parts of said property should have first been made. The Court ordered the two cases to be consolidated, and that, on payment into Court of the mortgage debt, interest and costs, the trustee be enjoined from making sale of the property. In this proceeding it was **Held**:

1st. That all the purchasers of the two lots having bought subject to the mortgage for \$2000, and the obligation of each to pay the mortgage forming part of the consideration of his purchase, they all stood upon equal footing and the mortgagee's assignee D. had the right to sell any part he might think proper for the payment of his debt; and that the party whose property might be sold, had a right to a proceeding to compel contribution from the other purchasers.

2nd. That M. G. had no right to an assignment of the mortgage and decree, on payment of the mortgage debt, interest and costs; but that such payment would entitle him to have contribution from the other parties, who had bought parts of the mortgaged premises. *Burger vs. Greif*, 518.

*See* **ACKNOWLEDGMENT.**

**CORPORATIONS**, 6.

**EJECTMENT**, 1.

**HUSBAND AND WIFE**, 2, 4.

**INSOLVENT LAWS**, 1.

**ORPHANS' COURT**, 7.

**MARSHALLING OF SECURITIES.**

**TRUSTS**, 2.

**MOTIONS.**

*See* **INDICTMENTS**, 1, 2.

**PRACTICE IN CRIMINAL CASES**, 3, 9.

**MURDER.**

*See* EVIDENCE, 1, 2, 3.

**NEGLIGENCE.**

*See* CORPORATIONS, 2.

**NEXT OF KIN.**

*See* ORPHANS' COURT, 5.

**NOTES.**

*See* ASSIGNEES' EQUITIES.

EVIDENCE, 7.

**NOTICE.**

*See* DISTRESS, 3.

MARSHALLING OF SECURITIES.

MECHANICS' LIEN, 3, 4.

MORTGAGES, 2.

**OBSTRUCTIONS TO RIGHT OF WAY.**

*See* PRACTICE IN EQUITY, 1.

**ORDER OF COURT.**

*See* TRUSTS, 2, 3.

**ORPHANS' COURT.**

1. So long as assets can be found which properly belong to the estate of a decedent which have not been brought in and accounted for, the estate is not fully closed, and the Orphans' Court on proper application has jurisdiction to compel a surviving executor to return such assets, or recover them when they can be recovered, even where an account, called final, had been passed and some fourteen years had elapsed since such account. *Wilson vs. McCarty, Surviv. Ex'r, 277.*
2. The Orphans' Court has jurisdiction to correct an account within a reasonable time, which depends upon the peculiar circumstances of each case and the character of the correction to be made. *Id.*
3. Where the petitioner to the Orphans' Court to have the accounts of a surviving executor enquired into, fourteen years after the passage of a final account, was a married woman when the accounts were passed and distribution made, no *laches* can be imputed to her in respect to the time of her petition filed within fifteen months after becoming a widow. *Id.*
4. To make a distribution an entire protection to an executor or administrator, it is necessary that such action be taken and such notice be given as the Code, Art. 93, secs. 138-143, provides to justify the Orphans' Court in making it. *Id.*



ORPHANS' COURT.—*Continued.*

5. The Orphans' Court under Art. 93, secs. 230-231, of the Code, has authority on application, to determine who are the next of kin, for the purposes of distribution. *Ib.*
6. In November, 1879, letters *d. b. n.* were granted to P. on the estate of L., fifty years after letters of administration were first granted. An inventory was in the same month returned by P. and in the following month M. petitioned the Orphans' Court, alleging that she was a grand-daughter of L. and entitled to letters, and prayed that those granted P. be revoked. P. alleged in answer, that M. and all other heirs and personal representatives had waived their rights of administration and directed him to administer, and that he had nearly completed the settlement of the estate. There was no written renunciation. P. also prayed for an issue among others, to a Court of law, as to whether M. had renounced any right she might have to administer. **HELD:**
  - 1st. That M. was not entitled to have the letters granted to P. revoked.
  - 2nd. That P. was entitled to have the issue sent to a Court of law for trial, though the question involved might have been decided by the Orphans' Court. *Pollard, Adm'r vs. Mohler*, 284.
7. G. died, leaving a widow and minor children surviving him. His widow took out letters of administration on his estate, and afterwards re-married. She passed her account, whereby she appropriated to her own use, at the appraised value, the decedent's estate, consisting for the most part of leasehold property, in satisfaction of her advances to the estate to pay its debts and expenses, and of her distributive share. Her second husband, after improving the leasehold property, mortgaged it (she uniting therein,) to C., who, under decree of foreclosure, bought the property at the trustee's sale. The administratrix having died, and the account being, upon application of her children of the first marriage, re-opened by the Orphans' Court and re-stated, and it being held that the leasehold property, was unadministered, the eldest son of G. was appointed administrator *d. b. n.*, and ordered to sell the leasehold property, and was about to do so, when stayed by an injunction, issued on the bill of complaint of the mortgagee. In this proceeding it was **HELD:**
  - 1st. That the widow and administratrix of G., had no right to appropriate the decedent's property to her own use; and that the Orphans' Court should not have authorized such act; that it was competent for that Court to re-open

ORPHANS' COURT.—*Continued.*

the account and have it re-stated, and show that the leasehold property remained unadministered.

2nd. That letters of administration *d. b. n.*, were properly granted to the son of G., as the husband of the deceased administratrix, was not authorized under Art. 93, sec. 12, of the Code, to take charge of, and administer property left unadministered by her; and that it was the right and duty of the administrator *d. b. n.*, to sell the leasehold property and account for the proceeds.

3rd. That the parties were chargeable with knowledge of the defects in the proceedings in the Orphans' Court, and should be held to have dealt with respect to the property, in subordination to the rights of those interested in the legal settlement of the estate; that the mortgagee, however, was entitled by virtue of his mortgage, to whatever interest or right the mortgagors had in the premises at the date of the mortgage; but that in dealing with the net proceeds of sale, there should be an equitable apportionment made between the value of the property as it was left by the decedent, and the permanent beneficial improvements placed thereon since his death, rating their value and the enhancement of the property, as at the time of the sale, the improvements thus to be allowed to bear their proportion of all taxes, insurance and other charges and expenses, assessed or paid upon the basis of the improved condition of the property; and after all proper deductions, made upon fair and just principles of accounting, from the value of the improvements thus ascertained, and the one-third interest of the widow of G., to which those amounts were subject, the balance, whatever that might be, would be the extent of the mortgagee's interest in the premises; and that amount he should receive from the proceeds of sale; and that this settlement might be effected in the Orphans' Court, or the bill in equity retained to enforce the rights of the parties. *Gavin, Trustee vs Carling*, 530.

See ARBITRATION AND AWARD.

EXECUTOR'S BOND, 2.

PANEL.

See PRACTICE IN CRIMINAL CASES, 8, 9.

PENALTY.

See ACTS OF ASSEMBLY, CONSTRUCTION OF, 5.

## PEREMPTORY CHALLENGES.

*See* PRACTICE IN CRIMINAL CASES, 8, 9, 10.

## PLEA IN ABATEMENT.

*See* PRACTICE IN CRIMINAL CASES, 2, 4.

## PLEAS AND PLEADING.

*See* CODE, CONSTRUCTION OF THE, 2.

EXECUTOR'S BOND.

INSOLVENT LAWS, 2, 3.

## POWERS.

1. In 1848, S. conveyed by deed certain leasehold property in Baltimore City, to A. G. R., in trust, for the sole and separate use of his wife A., "for and during her natural life," with power to receive the rents and profits thereof for her use and benefit, or to sell and dispose of the same or any part thereof absolutely, "so that neither the property nor the rents and profits or the proceeds thereof, shall at any time be subject to the control of S., nor be in anywise liable for his debts," and from and immediately after the death of A., "then in trust, as to the said property, or so much of the same as may remain undisposed of by her deed or contract, for the use and behoof of her issue, if any; and in the event of her death without issue, then to revert to the said S., his heirs or assigns." In 1850, S. purchased from McL., trustee, other leasehold property in said city, and united with McL., trustee, in conveying it to W. R. R., in trust, for the sole and separate use of A., "for the term of her natural life without the let or control of her present or of any future husband she might have, and if she should survive her present husband, then after his death with power to grant, assign, sell or dispose of said premises either by deed or will, but should she depart this life before the said S., then and in such case for the use of the said S., and his assigns." In August, 1851, S. purchased from C. other leasehold property in said city, and by his direction, C. conveyed it to W. R. R., "in trust, for the uses and purposes mentioned and set forth" in the deed from McL. and S. In October, 1851, S. purchased from L. other leasehold property in said city, and by his direction, L. conveyed it to W. R. R., in trust, "for the sole and separate use of A. without the let or control of her present or of any future husband whom she might have, and if she should survive her present husband, then after his death, with power to grant, assign, sell or dispose of the said premises either by deed or will, and whether *sole or covert*; but should she depart this life before the said S., then and in such case for the

**POWERS.—Continued.**

use of the said S., his executors, administrators and assigns." S. died in May, 1855, leaving a will executed in that month, by which he bequeathed to A., all his property for "her sole use and benefit during her natural life and to dispose of as she might think best;" and he made her his executrix. A. afterwards intermarried with F. and died intestate, in October, 1877, without issue by either marriage, and without having sold or disposed of by deed the property mentioned. In a proceeding to obtain a decree for the sale of the leasehold property and for a distribution of the proceeds among the parties entitled, it was HELD:

- 1st. That, as by the deeds of 1848, 1850, August, 1851, and October, 1851, (though there was no express limitation of an equitable life estate to A. by this latter deed,) only equitable life estates were conveyed, with powers to A. of disposition superadded, which were not executed to the extent of affecting the property in controversy, F., the sole appellant, took no interest therein after her death.
- 2nd. That the power of disposition given to A. by S's will, under which she took a life estate in the property, not having been executed by A. the title to the property in controversy has not been affected by the will.
- 3rd. That there should be an administration *d. b. n.* on S's estate, and that such administrator should be made a party to these proceedings before the decree for a sale be executed, as, if any interest in the property reverted to S's estate, such administration would be necessary to give title to the distributees and to purchasers under the decree. *Foss vs. Scarf, et al.*, 301.
2. The intention to execute a power, either by will or any other instrument, must appear by a reference in the instrument to the power, or to the subject of it, or from the fact that the instrument would be inoperative without the aid of the power. *Id.*

**PRACTICE.**

Where the entire and exclusive interest in a bill of exchange or other negotiable *chose in action* is vested in the holder thereof, he cannot institute an action upon it in the name of another party. Assignments of other *chooses in action* not negotiable, entitle the assignee to sue in the name of the assignor for the use of the assignee, or in his own name by virtue of Art. 9, sec. 1, of the Code. *Hampson vs. Owens, use of Stow*, 583.

PRACTICE.—*Continued.*

*See* ACTS OF ASSEMBLY, CONSTRUCTION OF, 6.

EJECTMENT.

INSOLVENT LAWS, 2, 3.

INSURANCE, 4.

ORPHANS' COURT.

SUBSCRIPTION TO STOCK.

TRUSTS, 2.

## PRACTICE IN THE COURT OF APPEALS.

1. A statement appended to the record transmitted to this Court at the instance of the plaintiff's attorney, in respect to an application to be allowed to supply additional proof in the Court below before the conclusion of the trial, but after the evidence had been closed and prayers submitted, if not finally acted on by the Court below, formed no part of the record and was not before this Court for consideration; and even if the matter had been embraced in a bill of exception, the Court's action could not be reviewed, it being within the Court's discretion under rules of Court.  
*Berry vs. Derwart and Wife*, 66.
2. Where the rules of the Court below provided, that after all the testimony was in, the prayers should all be offered and argued together, and that when the law of the case should have been elicited and settled, no additional prayers would be received unless by permission of the Court, the Court refused to consider additional prayers offered by a plaintiff after the Court had rejected his prayers and granted the defendant's. On exception by the plaintiff, it was HELD:  
That this was a matter within the discretion of the Court below and not the subject of appeal. *Porter vs. Bowers*, 213.
3. Where an objection to a prayer raised on a second appeal, was not before this Court on the former appeal, and could not be, for it did not appear in the exceptions to have been raised in the Court below, such prayer (so far as this objection is concerned) could not be held to have received the approval of this Court, and to be the law of the case to the end.  
*Treusch vs. Shryock & Clark*, 330.
4. Where an appellee had audits and accounts incorporated into the record by his direction, which were not properly before this Court, it was HELD.  
That the cost of that part of the record would be taxed to him. *Whyte and Horwitz, Trustees vs. Dimmock*, 452.
5. The record is construed, as it comes certified to the Court of Appeals. *De Atley vs. Senior*, 479.

PRACTICE IN THE COURT OF APPEALS.—*Continued.*

*See* APPEAL.

ARBITRATION AND AWARD.

INDICTMENTS, 1, 3.

SUBSCRIPTION TO STOCK.

PRACTICE IN CRIMINAL CASES.

1. An assignment of errors, "that in the record and proceedings, as also in the condition of the said judgment, manifest errors have happened, to the damage of the State, to wit: in overruling the demurrer of the State to the defendant's fifth plea to the indictment," is not sufficient under Rule 1, of the Court of Appeals. *State vs. Scarborough*, 345.
2. As it is a presumption of law that a grand jury was legally and regularly drawn and empanelled, a plea in abatement should expressly negative such presumption, upon the averment, that the jury consisted of only twenty-two persons, at the time an indictment was found. *Ib.*
3. Where there was a demurrer to an indictment which was overruled and after verdict of guilty, a motion in arrest of judgment, also overruled, and the traverser appealed under the Act of 1872, ch. 316, there being no final judgment, those rulings cannot be reviewed (not being brought into this Court as provided by Rule 1,) but only what is presented by the exceptions as allowed under the Act. *Johns vs. The State*, 350.
4. After the demurrer to an indictment had been overruled by the Court below, the traverser pleaded in abatement (not verified by affidavit,) that the grand jury by whom the indictment was found, had not been legally drawn, and was therefore not lawfully constituted, setting forth the particulars. The plea was traversed by the State, and the issue of fact tried before the Court. Evidence was offered in support of the averments, set out in an exception on an appeal by the traverser under the Act of 1872, ch. 316, but on the trial of that particular issue, no question appeared to be raised as to the admissibility of evidence or any distinct proposition of law made on which the Court was required to rule, there was no statement of facts in the record as having been found by the Court, but at the close of the evidence as set out in the exception, it is stated, the Court overruled the plea in abatement, and decided that the grand jury drawn from the box mentioned by a witness was legally constituted, and that the traverser should plead to the indictment. **Held:**
  - 1st. That it was not the function of this Court to review the evidence contained in the exception, and find the

PRACTICE IN CRIMINAL CASES.—*Continued.*

facts that may have been the basis of the rulings of the Court below, and that it could not therefore review the rulings, there being no special finding of the facts spread upon the record, either in the form of a special verdict, or a special finding by the Judge. *Id.*

2nd. That the plea in abatement, being a mere nullity for want of affidavit, was properly overruled. *Id.*

5. It is no ground of objection by a traverser that the persons drawn or summoned as jurors or talesmen were not called to the book in the order in which their names appear in the list, or the order in which they may have been drawn or summoned. It has been the uniform practice of the Courts of this State, to proceed to make up and swear the panel from such jurors or talesmen, as have been found attending the Court, without waiting for or directing process against others, who may have failed to attend, and whose names may have been first drawn, or who may have been first summoned. *Id.*
6. At the trial of the traverser on an indictment as a defaulter to the State, under the Act of 1872, ch. 329, the State offered to prove by a former clerk to the Commissioners, an entry on a ledger or book that had been kept by him as such clerk, showing the amount of State taxes that had been levied and placed in the hands of the traverser, as collector for 1878; and then proposed to ask the witness whether the taxes mentioned in the entry were placed in the hands of the traverser for collection, to this offer the traverser objected, and proved by the witness that he had made out and delivered to the traverser, as collector, a book containing items of the State taxes for that year, and that the delivery of the book was all that was done in the matter of placing the taxes, mentioned in the entry, in the hands of the traverser for collection; and further, that there was no special written order of the Commissioners, directing the placing of the taxes in the hands of the traverser. **Held:**

That the objection was properly overruled, and that the evidence was admissible. *Id.*

7. By the Act of 1872, ch. 329, relating to defaulters, the certificate of the comptroller of the State, attached to the statement of the account of a person indicted under that Act, showing the amount for which he was in default as collector of State taxes, is admissible as *prima facie* evidence in his prosecution for such defalcation; and the admissibility of such evidence does not contravene the Declaration of Rights,

PRACTICE IN CRIMINAL CASES.—*Continued.*

Art. 21, which is not to be understood as excluding all other evidence except oral evidence of witnesses produced in Court.

*Ib.*

8. At the trial of the traverser on an indictment as a defaulter under the Act of 1872, ch. 329, in not paying over county taxes, in the course of empanelling the jury, a talesman was called to the book and sworn on his *voir dire*, and was asked whether he had formed or expressed an opinion, as to the guilt or innocence of the traverser; to which he replied, that he had not, that his sympathies were with the traverser, but his prejudices were against him; and he did not think himself an impartial juror. The traverser, without requesting the juror to be further interrogated, objected to his being sworn, but the objection was overruled, and the traverser then peremptorily challenged the juror. The empanelling of the jury then proceeded, and after the traverser had exhausted his twenty peremptory challenges, another talesman was called, who had been drawn in an earlier stage of the proceeding, but who did not appear to be sworn until after the traverser had exhausted his challenges. This latter talesman was sworn, against the objection of the traverser. It does not appear that the traverser offered to challenge this last juror sworn, or that he was in any manner objectionable to him as a juror, or that he would have challenged him if his peremptory challenges had not been exhausted. The objection made was not to the particular juror, but, as stated in the exception, to the panel as made up; and the Court below having overruled the objection, the traverser excepted.

HELD:

That the objection was properly overruled. *Ib.*

9. At the trial of the appellant for murder, one of the panel of jurors was called, and being sworn and examined upon his *voir dire*, it was determined by the Court that he was an impartial juror; the prisoner then moved the Court to require the State to exercise its right of peremptory challenge before he should be required to exercise that right. But the Court overruled the motion, and in conformity to its uniform practice required the prisoner to exercise his right of peremptory challenge before the State was called on to exercise its right. Whereupon the prisoner excepted.

HELD:

That this ruling furnished no cause for reversal. *Turpin vs. The State*, 462.

10. The Act of 1872, ch. 40, relating to peremptory challenges, does not prescribe the order in which challenges shall be



PRACTICE IN CRIMINAL CASES.—*Continued.*

made, or direct whether the State or the prisoner shall first exercise the right. It would seem, therefore, that the course of proceeding in this respect is left to the discretion of the Circuit Court. It appears, that the practice in the circuits has not been uniform, while in several of them the practice has been to require the State to challenge first, in the City of Baltimore, and in the first and fourth circuits, a different rule has prevailed. *Ib.*

11. Evidence offered by the defence on an indictment for murder, which was mere matter of inducement, and not part of the *res gestae*, and would be mere hearsay, and immaterial to the issue in the cause, was properly excluded. *Ib.*
12. Evidence offered by the defence on an indictment for murder, to the effect that the deceased prior to the homicide, threatened the defendant's life is admissible, unless proof be first given that there was an overt act of attack, and that the defendant at the time of the collision, was in apparent imminent danger. *Ib.*
13. On an indictment for murder, the prisoner's wife was called for the defence, but was properly not permitted to testify. A wife has not been made competent in such a case by the Acts of 1864, ch. 109, and 1876, ch. 357. *Ib.*
14. The defendants were indicted in the Court below for stealing three bushels of wheat. The indictment contained three counts. The first count described the wheat as the property of the N. C. R. C. The second count described it as the property of the said N. C. R. C., in its capacity as common carrier and bailee of said wheat. The third count described it as the property of certain persons doing business under the name of M. & Co., the alleged consignees of the said wheat. The defendants moved to quash the indictment for defects, which they alleged, were apparent on its face, but which were not stated in the motion. The Court below quashed the indictment. Whereupon the attorney for the State, desiring to have the record removed into this Court, as upon writ of error, filed a petition in the name of the State, designating the questions of law, by the decision of which the State was aggrieved; namely, the quashing of the indictment. The petition stated that the point of the defendants was, that the ownership of the property, alleged in the indictment to have been stolen, could not be properly charged, in the same indictment, as being in different persons; inasmuch as this was, in effect, holding the defendants to answer upon several and distinct charges. The record

PRACTICE IN CRIMINAL CASES.—*Continued.*

being by order of the Court below, brought into this Court, it was **HELD**:

- 1st. That the State's petition met the requirements of the rule of this Court as to petitions in the nature of writs of error, and that the decision of the Court below was properly before this Court for review, as the action of the Court below in quashing the indictment did not depend upon its arbitrary discretion, but its discretion should have been governed by rules, and having acted in violation of them, its judgment could be reviewed and reversed.
- 2nd. That the indictment was sufficient in law, and the variation in the different counts, in alleging the ownership of the property charged to be stolen, formed no valid objection to it.
- 3rd. That if the objection to the indictment had been valid, it was not one for which a demurrer lay under Art. 80, sec. 82, of the Code, but it would have been competent for the Court in its discretion either to compel the prosecutor to elect upon which count he would proceed, or in a clear case to quash the indictment.  
*State vs. McNally and Myers*, 559.

*See* EVIDENCE, 1, 2, 3.

FORGERY.

INDICTMENTS.

## PRACTICE IN EQUITY.

1. If, by reason of obstructions erected on a strip of ground alleged to be a public way, the applicant for an injunction for their abatement, claiming the use of the strip of ground as one of the public, and negating by the allegations of his bill and his testimony, all mere private right in it, were obstructed or deprived of reasonable access to his buildings on his lot, and thereby subjected to loss and inconvenience, that would be such special and particular injury as would entitle him, (if the allegations were well founded in fact,) to remedy from a Court of Equity. But the applicant for such an injunction and the purchaser of the strip of ground having contracted with each other in respect to its use, and the manner of user, on failure of compliance, the remedy would be on the agreement. *Gore vs. Brubaker*, 87.
2. The question of costs is a matter within the discretion of the Court below. A decree, in other respects right, will not be disturbed, even if there was an improper direction as to the

PRACTICE IN EQUITY.—*Continued.*

party or fund charged with the payment of costs. *Dodge, et al. vs. Stanhope & McLaughlin, et al.*, 113.

3. Appearance fees should not be allowed on exceptions to an auditor's accounts, or other collateral proceedings in chancery upon petition. *Id.*
4. Under a decree of Court which allowed a rate of commission of five *per cent.* on the amount of "all collections which the trustee may make as trustee of the estate, and also, a further commission of five *per cent.* on the amount of all disbursements and investments which he has made, or may hereafter make;" which provisions was referred to by a subsequent order appointing the appellants, trustees, as fixing the rate of commission to be allowed them, payments over to the appellee, a *cestui que trust*, of moneys collected, and upon which commissions had been allowed for such collection, were not disbursements within the meaning of the decree, in regard to the commission to be allowed. The word "disbursements" was used as meaning expenditures during the existence of the trust, as contradistinguished from payments over to the *cestui que trust*. *Whyte and Horwitz, Trustees vs. Dimmock*, 452.
5. A trustee appointed by decree to sell mortgaged real estate, who sold the same, and received part of the purchase money from the purchaser, and who, on failure of the purchaser to pay any part of the balance, or to comply with the terms of sale as prescribed by the decree, obtained an order for the re-sale of the property, and re-sold it, should be allowed commissions only on the sum actually received by him on account of the first sale, and also commissions on the whole amount of the re-sale. He is entitled in such case to only one appearance fee. *McCullough, Trustee vs. Pierce*, 540.
6. Where a loss has resulted to the mortgagee by reason of the default of the first purchaser, he remains liable for the loss on the re-sale, (if any,) and the expenses attending the same, and if the trustee should collect the same, he would be entitled to commissions on the sums so collected. *Id.*
7. A Circuit Court has no power to adopt a rule allowing, where a decree or order for sale is passed, a fee of \$30 to the complainant's solicitor, and an allowance under it by the auditor of that sum to a trustee who sold mortgaged real estate, "as counsel for complainant," should not have been made. *Id.*
8. A trustee appointed by decree to sell real estate, should exact a prompt compliance with the terms of the sale, or should

**PRACTICE IN EQUITY.—Continued.**

require security from the purchaser for his compliance therewith, before the sale is ratified. *Ib.*

*See* ACTS OF ASSEMBLY, CONSTRUCTION OF, 3, 4.

APPEAL.

CORPORATIONS, 1.

DEEDS.

DISTRIBUTION UNDER A DEED OF TRUST.

EQUITY.

EVIDENCE, 4, 5, 6.

HUSBAND AND WIFE, 2, 4.

INSURANCE, 4.

MECHANICS' LIEN, 4.

MORTGAGES, 1, 3, 4.

ORPHANS' COURT, 7.

POWERS.

PRACTICE IN THE COURT OF APPEALS, 4.

**PRAYERS AND INSTRUCTIONS.**

*See* EXECUTOR'S BOND, 2.

PRACTICE IN THE COURT OF APPEALS, 2, 3.

SUBSCRIPTION TO STOCK.

**PRICE, INADEQUACY OF.**

*See* MORTGAGES, 1.

**PRIORITY OF LIENS.**

*See* JUDGMENTS.

MARSHALLING OF SECURITIES.

MORTGAGES, 6.

**PROMISSORY NOTES.**

*See* EVIDENCE, 7.

**PUBLIC EDUCATION.**

*See* ACTS OF ASSEMBLY, CONSTRUCTION OF, 3.

**PUBLIC LOCAL LAWS.**

*See* ACTS OF ASSEMBLY, CONSTRUCTION OF, 1, 2, 3, 5, 6.

**PUBLIC WAY.**

*See* PRACTICE IN EQUITY, 1.

**RAILROADS.**

*See* ACTS OF ASSEMBLY, CONSTRUCTION OF, 4, 5, 6.

**RE-SALE.**

*See* PRACTICE IN EQUITY, 5, 6.

**REAL ESTATE.**

*See* ANNUITY.

DEEDS.

MORTGAGES.

## RECEIVERS.

*See* APPEAL, 2.  
MORTGAGES, 4.

## RECEIVING STOLEN GOODS.

*See* INDICTMENTS, 4-6.

## RECORD.

*See* PRACTICE IN THE COURT OF APPEALS, 1, 4, 5.

## REFORM.

*See* INSURANCE, 4.

## RELEASE OF MORTGAGE.

*See* MORTGAGES, 6.  
TRUSTS, 2.

## REMITTER.

*See* SUBSCRIPTION TO STOCK.

## RENUNCIATION.

*See* ORPHANS' COURT, 6.

## REPRESENTATIONS, INJURIOUS.

*See* MORTGAGES, 1.

## RIGHT OF WAY.

*See* ACTS OF ASSEMBLY, CONSTRUCTION OF, 4.  
PRACTICE IN EQUITY, 1.

## RULES OF COURT.

*See* MORTGAGES, 3.  
PRACTICE IN COURT OF APPEALS, 1, 2.  
PRACTICE IN CRIMINAL CASES, 14.  
PRACTICE IN EQUITY, 7.

## SALES.

*See* APPEAL, 2, 3.  
DEEDS.  
DISTRESS, 3, 4, 5.  
MORTGAGES, 1, 3, 4, 6.  
ORPHANS' COURT, 7.  
PRACTICE IN EQUITY, 5-8.

## SCHOOLS.

*See* ACTS OF ASSEMBLY, CONSTRUCTION OF, 3.

## SHIPS.

*See* TAXATION, 1.

## STATUTES, BRITISH.

2 W. & M., chap. 5. 326.  
3 W. & M., chap. 9, sec. 4. 185.

STATUTES, BRITISH.—*Continued.*

- 1 Ann Stat. II, chap. 9, sec. 2. 185.
- 5 Ann, chap. 31, secs. 5 and 6. 136.
- 4 George II, chap. 28. 300.
- 24 George II, chap. 23. 24.
- 15 & 16 Vic., chap. 76. 299.
- 19 & 20 Vic., chap. 97, sec. 5. 197, 199.

## STOCK.

*See* FORGERY, 1, 2.

TAXATION, 3, 4.

## STOCKHOLDERS.

*See* CORPORATIONS.

## SUBSCRIPTION TO STOCK.

F. subscribed for and agreed to take five shares of the stock of a land and loan company, and to pay \$400 per share therefor, in weekly instalments of one dollar on each share until paid in full; and his name as such subscriber by his direction was entered by the company's secretary on its stock ledger about the 16th of February 1871, on which day he made his first payment, and continued to pay until the 4th of June, 1874, and had the payments entered in his book and received his dividends. On a suit by the receivers of the company brought the 18th of March, 1879, to recover the instalments, which he had failed to pay for more than 150 weeks last past, it was HELD:

- 1st. That the Statute of Limitations was no bar to the action, as F. was bound by his contract to pay in weekly instalments, though the time of payment was extended beyond the period of two years prescribed by the Act of 1868, ch. 471, sec. 59.
- 2nd. That this subscription was not within the class of contracts on which interest is recoverable as of right.
- 3rd. That this Court has no power to modify the judgment in this case, in which the jury were instructed to allow interest, as a matter of right, on the several weekly instalments from the times they respectively fell due, by remitting the amount of such interest. Such case does not fall under Art. 5, sec. 14 or Art. 29, secs. 39 and 40 of the Code. *Frank vs. Morrison, et al., Receivers*, 399.

## SUBROGATION.

*See* EXECUTOR'S BOND, 1.

## SUNDAY LIQUOR LAW.

*See* ACTS OF ASSEMBLY, CONSTRUCTION OF, 7, 8.

## SURETIES.

*See* EXECUTOR'S BOND.

## TALESMEN.

*See* PRACTICE IN CRIMINAL CASES, 5, 8.

## TAXATION AND TAXES.

1. The interest of a citizen of Maryland, and resident of Baltimore, as part owner of vessels employed in foreign commerce, registered as vessels of the United States in the office of the Collector of Customs at Baltimore, the home port of the vessels, and the domicil and usual place of residence of their acting and managing owners, is liable for annual taxes levied on it for municipal purposes by the authorities of that city; and such taxation does not contravene the Constitution of the United States. *Gunther vs. M. & C. C. of Balto.*, 459.
2. An action of *assumpsit* by the Mayor and City Council of Baltimore against a delinquent tax-payer, to recover unpaid taxes, is withdrawn from the operation of Art. 57, sec. 1, of the Code, relating to Limitations, by the Act of 1861, ch. 94, which extended the period for the collection of taxes levied in that city, from three to four years. Sec. 92 of Art. 81 of the Code, which required the collection of taxes within three years, (extended to four years by the Act of 1874, ch. 483, sec. 82.) did not apply to the City of Baltimore. *Ib.*
3. An amount of gross premiums received in this State in 1879, by a foreign insurance company, doing business in this State under license, and invested in certificates of indebtedness of the Mayor and City Council of Baltimore, known as Water Stock, with the intention of holding the same for not less than two years, was exempted from taxation by the 31st sec. of the Act of 1878, ch. 106, relating to insurance companies. *State, use of Hines, Ins. Comm'r vs. Pres. & Dir. Ins. Co., N. Am.*, 492.
4. The purchase of certificates of Water Stock of the Mayor and City Council of Baltimore, is a loan, within the meaning of the Act of 1878, ch. 106, sec. 31. *Ib.*

*See* MORTGAGES, 3.

PRACTICE IN CRIMINAL CASES, 6, 7, 8.

## TENANCY BY THE CURTESY.

*See* HUSBAND AND WIFE, 2.

## TOBACCO INSPECTION.

*See* ACTS OF ASSEMBLY, CONSTRUCTION OF, 5.

## TRESPASS.

1. An action of trespass *quare clausum fregit* can be maintained for breaking and entering a burial lot; the trespass com-

TRESPASS.—*Continued.*

- plained of being the digging a grave in the lot and burying therein the corpse of a child without the consent of the plaintiff, who had acquired the privilege and right to make interments in the lot to the exclusion of others, so long as the ground belonging to a society of which the plaintiff was a member, (in which ground was the lot purchased by the plaintiff,) remained a cemetery; and which right or privilege had not been forfeited or lost at the time the action was brought, though the plaintiff had withdrawn from the society, which was subsequently incorporated by the Act of 1867, ch. 343. *Smith vs. Thompson*, 5.
2. There being evidence before the jury from which they could find that the defendant was actuated by malice in committing the trespass, the plaintiff was entitled to punitive damages. *Ib.*

## TRUSTS, TRUSTEES, CESTUIS QUE TRUST.

1. The fact that money due to a *cestui que trust* is allowed to remain in a trustee's hands with the consent of the *cestui que trust*, does not change the nature of the debt itself. It still remains a debt due by the trustee in his character as trustee. *Crisfield vs. The State, use of Handy, et al.*, 192.
2. By an order of the Superior Court of Baltimore City, passed in a cause in equity the 8th February, 1869, E. W. B. who had, in September, 1863, been duly appointed trustee therein, was authorized to loan to W. G. R. the husband of E., one of the *cestuis que trust*, \$12,000. of the trust fund of said cause, secured by the bond of W. G. R. and Mrs. S. C. R., and a mortgage of a farm in Baltimore County. On the 23rd December, 1869, E. W. B., trustee, without order of or report to the Court, and without its approval, released the mortgage of the farm, and on the same day took in lieu thereof to secure the same loan, a mortgage from Mrs. S. C. R. of another tract of land in said county. On the 28th April, 1870, E. W. B., trustee, without order of or report to the Court, and without its approval, united with Mrs. S. C. R. in executing a deed to P., conveying to him a part of the tract of land included in the mortgage last mentioned in consideration of \$5026.88, paid by P. but not to the trustee, thereby releasing from the mortgage the parcel so conveyed. On the 6th January, 1871, this parcel was, for a valuable consideration, conveyed by P. and wife to A. In November, 1871, Mrs. S. C. R. made a deed of trust of all her property for the benefit of her creditors. Her estate paid a very small



TRUST, TRUSTEES, CESTUIS QUE TRUST.—*Continued.*

dividend. W. G. R. died insolvent in February, 1878. After the death of E. W. B. in October, 1877, F. J. B. and the late F. W. B. were by order of the Superior Court, appointed trustees in E. W. B.'s stead. Default having been made in paying the interest on the loan, and in paying the principal, after due notice, the new trustees proceeded under the power contained in the mortgage of the 23rd December, 1869, to sell all such part of the tract of land as remained unreleased. The sale was duly reported to and ratified by the Circuit Court for Baltimore County. The proceeds from the sale were \$5206, leaving a balance still due the trustees of \$8614.42, with interest from the day of sale, the 30th April, 1878. On the 17th May, 1878, without authority from the Superior Court, for that purpose first obtained, the trustees filed their bill in the Circuit Court for Baltimore County, to set aside the release executed by E. W. B., late trustee, to P., and to obtain a decree for the sale of the parcel of land (not worth more than the balance due,) conveyed by P. and P. and wife to A., for the purpose of satisfying the said balance. **Held:**

1st. That the trustees had authority to institute the suit; and that the Circuit Court for Baltimore County had jurisdiction.

2nd. That they were entitled to the relief prayed. *Abell vs. Brown, Surviving Trustee*, 217.

3. Defendants to whom a deed in trust was made of property for the benefit of the grantor's creditors, and who were authorized by order of a Court of equity to complete certain houses thereby conveyed to them, in course of building when the deed was made, are responsible in their individual capacity, for work and materials furnished by a plaintiff upon their order, for the completion of the buildings, it appearing that there was no agreement on his part to look to the trust estate alone for payment. The order of Court was an indemnity to the trustees for having the work done, to be allowed them out of the trust funds. *Gill, et al. vs. Carmine*, 339.

See APPEAL, 4.

## DEEDS.

HUSBAND AND WIFE, 2.

MORTGAGES, 4, 6.

PRACTICE IN EQUITY, 4-8.

POWERS.

## WIFE'S PROPERTY.

*See* DEEDS.

HUSBAND AND WIFE.

## WILLS.

1. The will of B. dated in May, 1878, contained the following:
  - 1st. A provision for the preservation and protection of the testator's lot in a cemetery. 2nd. A provision directing the manner in which his grave should be marked, and limiting the privilege of interment in his burial lot. 3rd. A provision for the payment to his brother, of a proportion of the expenses which his brother had incurred in removing the remains of members of the testator's family to a burial lot; and also for a legacy of \$1000 to the brother. The fourth provision was as follows: "I direct that the sum of \$10,000 shall be set aside and invested by my executors hereinafter named, in a safe security, and the income thereof annually to be paid to T. P., for and during her life, if she shall be and remain unmarried: at her death, or upon her marriage, the principal sum above named to become and be a part of the residue of my estate, and to be disposed of as hereinafter provided for." Then follows a statement of his reasons for making this bequest. 5th. A provision disposing of the rest and residue of his property in favor of his son C., if he should be alive at the death of the testator; and in the event of the death of C., making other dispositions of said rest and residue. Finally, he appointed his executors. In February, 1876, he executed the following codicil to his will:

"First. I revoke all devises and bequests given by me to my son C., therein, absolutely, and in lieu thereof, I devise to him all my real estate for life; after his death, then to go to the Trustees of the Johns Hopkins University, for them therewith to endow any medical professorship therein, they may think proper. Secondly. I bequeath to my brother, in lieu of the \$1000 in said will given, the sum of \$5000 for life; after his death, to go to said trustees of said University for said purpose. Thirdly. I bequeath the \$15,000 in bonds in my box in bank, and the money on deposit in the banking house of J. S. G. & Co., and any other personalty of which I am possessed, to the said trustees of said University for said purpose, hereby republishing said will in every other respect." In a proceeding in equity, it was HELD:

That B. meant to revoke and alter the third and fifth clauses of his will only, and by the last clause in the

WILLS.—*Continued.*

codicil, to give the rest of his personality, not disposed of by the preceding clauses, to the University; subject, however, to the two provisions of his will in regard to his burial lot, and subject to the legacy of \$10,000 in favor of T. P. *Johns Hopkins Univ., et al. vs. Pinckney*, 365.

2. The will of W. B. H. contained an item bequeathing to his brother C. L. H., "the sum of twenty-five hundred dollars, secured by a mortgage from W. H., for that, he, the said C. L. H., shall look after and take care of our beloved brother R., while he shall live and bury him at his death." It appeared, that at the time W. B. H. was about to make his will, R. was sick, and W. B. H. asked C. L. H. for what sum of money he would take care of R. and bury him at his death, and that C. L. H. agreed to perform said services for the amount willed to him; that C. L. H. accordingly took charge of R., who was at his house, and buried him at his death, which happened before that of the testator. In a proceeding in equity to obtain a construction of the will, it was HELD: That the condition annexed to the bequest to C. L. H., was a condition subsequent, and its performance becoming impossible by the act of God, he took unconditionally. *Hammond vs. Hammond*, 575.
3. Extrinsic evidence in the interpretation of wills, is admissible, not to show what the testator meant, as distinguished from what his words express, but simply what is the meaning of his words. *Ib.*
4. A will speaks from the death of the testator, and not from its date, unless by a fair construction its language indicates the contrary intention. *Ib.*

See ANNUITY.

EXECUTOR'S BOND.

POWERS, 2.

## WRIT OF ERROR.

See INDICTMENTS, 1, 3.

PRACTICE IN CRIMINAL CASES, 1, 3, 14.

*Ex. J. i. Q*







